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In the Supreme Court of the United States

OCTOBER TERM 1934

No. 606

THE ATCHISON, TOPEKA & SANTA FE RAILWAY Company et al., Appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, and Hygrade Food Products Corporation

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No. 607

THE UNION STOCK YARD & TRANSIT COMPANY OF Chicago, Appellant

v.

THE UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, and Hygrade Food Products Corporation

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the specially constituted District Court (R. 54), *Atchison, T. & S. F. Ry. Co.* v. *United States*, is reported at 8 F. Supp. 825.

The report of the Commission (R. 24), *Hygrade Food Products Corporation* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, is published at 195 I. C. C. 553.

QUESTIONS

The question presented is the validity of an order of the Interstate Commerce Commission (R. 37) and of the decree of the court below upholding said order (R. 61), which requires the appellants to cease and desist from the practice which subjects the complainant in the Commission proceeding to the payment of yardage charges in connection with interstate carload shipments of livestock consigned to complainant at Union Stocks Yards, Chicago, Ill., in instances where delivery is taken by the complainant at the unloading pens provided for such purposes in the yards.

The principal subordinate questions are:

1. Whether the order is one within the jurisdiction and authority of the Commission under the provisions of the Interstate Commerce Act.

(a) Whether the jurisdiction of the Commission under the Interstate Commerce Act terminates upon the unloading of the livestock into suitable pens in the Union Stock Yards or whether, in view of the special definition of the term "transportation" in section 1 (3) of the Interstate Commerce Act as including "all services in connection with the * * * delivery * * * of property transported," the jurisdiction of the Commission continues until the stock is taken

into possession by the consignee and removed from the premises.

(b) Whether the yardage charges in question are subject to the jurisdiction of the Secretary of Agriculture under the Packers & Stock Yards Act notwithstanding the provision in that act that nothing therein shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary of Agriculture concurrent power or jurisdiction over any matter within the power or jurisdiction of the Interstate Commerce Commission.

(c) Whether the provision in section 15 (5) of the Interstate Commerce Act, that "transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner," with certain exceptions not here relevant, is a limitation upon the jurisdiction of the Commission over "transportation" as defined in section 1 (3) of the Act.

2. Whether the Commission's finding of fact that the Chicago Union Stock Yards are the livestock terminal of all the individual line-haul carriers bringing livestock to Chicago is supported by the evidence.

3. Whether the existence of certain pens in the outskirts of the City of Chicago, the use of which by complainant before the Commission is impractical,

affects the validity of the Commission's finding that the complainant is entitled to delivery, without extra charge for the mere delivery, at the carriers' established livestock terminal in Chicago, the Union Stock Yards.

4. Whether the Commission's findings are adequate to support the order, and whether the order is uncertain and indefinite.

5. Whether the inclusion among the defendants against whom the order was directed of the Stock Yards Company was within the Commission's authority.

STATUTES

Pertinent statutory provisions are set forth in the Appendix.

STATEMENT

The proceeding before the Commission was initiated by complaint (R. 16), which as amended (R. 22) alleged *inter alia* that certain yardage charges assessed in connection with the transportation of interstate shipments of livestock, in carloads, consigned to complainant at Chicago, Ill., for delivery through the Union Stock Yards, were unreasonable, in violation of section 1 of the Interstate Commerce Act, were not published in any tariff on file with the Commission but were assessed in addition to the applicable rates and charges specified in the tariffs so on file, in violation of section 6 of the Act, were assessed in violation of section 15 (5) of said Act, and were in certain respects unjustly discriminatory and preferential, in violation of sections 2 and 3.

Answers to the complaint were filed and thereafter a public hearing was held, at which the facts were developed.[1] Thereafter printed briefs were filed with the Commission; an examiner's proposed report was issued, to which certain exceptions were filed, and the case was orally argued at Washington before Division 5 of the Commission (Commissioners Lewis, Tate and Farrell). Subsequently the case was reargued before the Commission as a whole. July 25, 1933, the Commission rendered its report (R. 24), which was concurred in by Commissioners Farrell (Chairman), Aitchison, Eastman, McManamy, Brainerd, and Tate, with the other commissioners dissenting. (R. 32.) No order was issued at that time but later, at the suggestion of the parties, the aforesaid order of July 2, 1934, was issued and served.

Facts found by the Commission

The essential facts are briefly stated in the Commission's report. (R. 24–37.) Some of these facts, supplemented by explanatory details shown by the record, as to which there was practically no dispute, are as follows:

Complainant is engaged in the meat packing business, and operates a slaughterhouse and packing plant in the Stockyards District of Chicago. (R. 25, 99.) Its plant lies directly north of the unloading pens of the Union Stock Yards, which are

[1] The testimony is before the Court in narrative form. (R. 97–184.) The documentary exhibits are before the Court as original exhibits. The most important ones are in a separate volume, entitled "Original Exhibits."

operated by the Union Stock Yard & Transit Co. (R. 25.) Its plant is reached and served by the Chicago Junction Railway and sidetracks connecting with that railway extend into and run alongside buildings, stock pens, and loading platforms in the plant. (R. 25, 100–102.) Inbound shipments of all commodities, other than livestock, are switched into its plant and delivered there by the Chicago Junction. (R. 25, 103, and Ex. 6.) Outbound shipments of its products are similarly switched from its plant by the Chicago Junction. (R. 25, 26, 104, and Ex. 7.) Complainant purchases substantial quantities of livestock in Nebraska, Iowa, Minnesota, and other western States, and has it shipped to itself in interstate commerce by rail for delivery at and slaughter in its plant at Chicago. (R. 25, 102, 105, and Ex. 10.) None of these shipments has been delivered on the sidetracks in complainant's plant. (R. 25, 115.) Under an arrangement between the railroads and the Yards Company all such shipments have been carried into the Union Stock Yards by the line-haul carriers. (R. 25, 26, 148.)

The rails of the Chicago Junction exclusively reach the Stock Yards (R. 26, 106, 164, and Ex. 1) but the transportation of interstate livestock shipments into the Yards is not performed by that carrier. All the line-haul carriers transporting livestock to Chicago have trackage rights over the Chicago Junction, and they bring in their trainloads of livestock with their own locomotives and crews. (R. 30, 106, 164.) Upon arrival in the Yards they place the cars opposite the

unloading platforms maintained by the Yards Company. These platforms are provided with chutes or inclines connecting them with unloading pens which have capacities sufficient to hold any carload of livestock. (R. 30, 136, 139.) The unloading is done by stockyards' employees as agent for and at the expense of the railroads. (R. 30, 106, 148–150, and Ex. 22.) The consignee may and often does take delivery of his shipments at the unloading pens. (R. 30, 107, 150.) The unloading pens are not adapted to the prolonged holding of animals, or for their feeding, watering and special care; from them the animals must be removed promptly, and if delivery is not then taken by the consignees the animals are placed in holding pens where they may receive the attention required. (R. 30, 150, 152–153.)

As to about 15% of all shipments consigned to complainant it has taken delivery before the animals were placed in holding pens, and in such instances has driven them from the unloading pens over scales and across and through the ways provided by the Stock Yards Company to complainant's pens and plant, located across a street from the Yards and connected therewith by a subway under the street. (R. 25, 30, 99, 107, 108, 121.) [2]

The rates lawfully applicable to this transportation are the line-haul rates to Chicago, plus a terminal charge of $2.70 per car on shipments from the West and $1.35 per car on shipments from the East. (R.

[2] The record also shows that there is a viaduct from the stockyards leading into the complainant's plant. (R. 121, 139.)

26, 106, 110.) Out of these rates the line-haul carriers pay or absorb the unloading charge of the Yards Company of $1.00 per car. (R. 30, 106, 110-111, and Ex. 22.)

Yardage charges per animal are assessed on all shipments of livestock delivered at the Union Stock Yards, and have been assessed since the establishment of the yards. (R. 27.) In addition to the line-haul rates plus the terminal charge of $2.70 or $1.35 per car, complainant is compelled to pay these yardage charges whether it takes delivery from the unloading pens or subsequently from the holding pens. (R. 107.) These yardage charges are assessed on a per head basis and vary according to the kind of stock, being 35 cents per head on cattle, 25 cents per head on calves, 12 cents per head on hogs, and 8 cents per head on sheep. (R. 27, 108, and Ex. 23.)[3]

A schedule naming these yardage charges (Ex. 23) is filed with the Department of Agriculture in purported compliance with the Packers and Stockyards Act, 1921 (c. 64, 42 Stat. 159, U. S. C., tit. 7, secs. 181-229) but they are not named in any schedule

[3] The aggregate yardage charges range from about $3.00 per car to a maximum of possibly $20 per car or over. It was testified that in the case of hogs a single-deck car might come in with as few as 24 or 25 hogs, which would make the yardage charge roughly $3.00 for the car. There might be as many as 100 in a double-deck car, resulting in a yardage charge of $13.20. Cattle will average about 28 or 29 to the car, making the yardage charge around $10 per car. Sheep run in double-deck cars 250 or over, making the yardage charge $20 or over per car. (R. 108.) The largest percentage of complainant's shipments are hogs. See Ex. 4.

filed with the Commission under section 6 of the Interstate Commerce Act. (R. 27, 107, 152.)

Conclusions of fact and ultimate findings

Based on a large volume of evidence, which is referred to in a subsequent section of this brief, the Commission made the following finding:

> The Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual line-haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all these carriers. They provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make. (R. 26.)

Closely related to this finding are the findings that no livestock have ever moved by rail to or from the sidings at complainant's plant or to or from rails adjacent thereto (R. 25); that no sidetrack delivery of livestock to any packing house or other industry is made by the Chicago Junction (R. 26); that defendants have refused to provide for the delivery of livestock at complainant's plant at the rates and charges which apply on livestock delivered at the Union Stock Yards (R. 26); that no carrier, with one exception, delivers or places carload shipments of livestock at any private industry in Chicago (R. 26), the exception being the Burlington in the case of deliveries to the Omaha Packing Company, a subsidiary of Swift & Co. (R. 26); and that Swift & Co., the complainant, and all dealers in livestock in Chi-

cago, other than the Omaha Packing Co., receive direct or buy after receipt by others all inbound livestock at the Union Stock Yards. (R. 26.)

The allegation in the complaint, to the effect that complainant was discriminated against and the Omaha Packing Company was unduly preferred, because sidetrack deliveries were made at the plant of the Omaha Packing Company without yardage charges, whereas complainant was compelled to take delivery of its livestock shipments in the Union Stock Yards and pay its yardage charges, was overruled. (R. 26–27.) The Commission also overruled the allegation that the switching charge of the Chicago Junction which would apply if track delivery were made at complainant's plant was unreasonable. (R. 26, 31.)

The Commission sustained the allegation of the complaint that the yardage charges are not carried in any tariff on file with the Commission and are therefore collected without tariff authority in violation of section 6, but held that "The fact that certain services come within the term transportation as defined in section 1 of the Interstate Commerce Act, and the fact that charges assessed for such services are not in any schedule on file with us are not of themselves sufficient reasons why no charges may be made therefor," citing *Memphis Freight Bureau* v. *K. C. S. Ry. Co.*, 17 I. C. C. 90. (R. 27.)

In that case, which was decided in 1909, the carrier had performed certain transportation service (refrigeration) and had collected certain charges for

that service without any tariff authority whatsoever. The Commission ruled that where a carrier has performed a transportation service without tariff authority it would not require the carrier to refund the entire amount of the charge, but that it would determine what was a reasonable charge for the service and order repayment only of the amount, if any, which the carrier has collected over and above such reasonable charge. In that case it was established that the carrier actually performed the refrigeration service; and there is no doubt that refrigeration is a transportation service for which a charge in addition to the line-haul transportation may properly be collected. Cf. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States* (*Pre-Cooling* case), 232 U. S. 199.

In the case at bar, however, the Commission found that in instances where complainant takes delivery of the stock at the unloading pens, there are no services performed thereafter for which defendants may assess charges. (R. 31.)

It differentiated between such instances and instances where the livestock is passed into the holding pens awaiting delivery to the consignee, finding that a charge for the yardage of livestock after consignee has failed to take advantage of a reasonable opportunity afforded to obtain prompt delivery is not a violation of any provision of the Interstate Commerce Act (R. 29); that what constitutes a reasonable opportunity may be determined from the circumstances at the particular yards concerned. At the Chicago yards, which it found to be "the greatest

livestock terminal and market in the world", where 14 million animals were unloaded in 1930, the magnitude of the business done demands a degree of promptitude in the receipt and removal of animals that is not generally essential, the average time of unloading being about two minutes to the carload. The unloading pens are not adapted, the Commission found, for the prolonged holding of animals or for their feeding, watering, and special care; from them the animals must be removed promptly, and if delivery is not then taken by the consignees the animals are placed in holding pens where they may receive the attention required. (R. 30.)

The Commission said it does not appear that there is any occasion for placing the animals into holding pens if prompt delivery is desired, and that there cannot be reasonable doubt that the unloading chutes and pens are suitable for the receipt of livestock and the accomplishment of proper delivery to complainant. (R. 30.)

Though recognizing the generally prevailing rule that consignees of freight are entitled to a reasonable time in which to remove their shipments from the carrier's premises, and are subject to storage or demurrage charges only after the lapse of considerable time, see *Demurrage Investigation*, 19 I. C. C. 496, *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 283, *Advances in Demurrage Charges*, 25 I. C. C. 314, 315, *Penna. R. R. Co.* v. *Kittanning Co.* 253 U. S. 319, 323, *Dakota Monumental Co.* v. *Director General*, 59 I. C. C. 101, the Commission refused to require that

such a period of time be allowed in connection with livestock delivered through the Chicago Union Stock Yards, stating:

> The fact that other freight is subject to storage or demurrage charges only after a lapse of considerable time is not a sufficient reason why a similar rule should apply in respect of yardage charges on livestock. After unloading, livestock requires unusual attention and care such as is not required by other freight. (R. 30–31.)

It said that it had found in *Strauss & Adler* v. *New York Central R. Co.*, 188 I. C. C. 487, that under the provisions of section 15, paragraph (5), of the Interstate Commerce Act and under the 28-hour law (c. 3594, 34 Stat. 607, U. S. C. Tit. 45, c. 4, sec. 71–74), unloading en route is required "into properly equipped pens for rest, feed and water" without extra charge, but that prompt delivery of livestock to complainant at the Union Stock Yards does not require pens so equipped. And the Commission expressly held—

> If placement into such pens is desired, an extra charge therefor is not within the inhibition of section 15 that an extra charge may not be assessed.

It was found that "Within the switching limits of Chicago, in addition to the facilities of the Union Stock Yards, certain of the line-haul carriers maintain facilities for unloading livestock, the use of which by complainant is impractical." (R. 26.) The Commission held, however, that "The fact that the line-haul carriers have other places of delivery at Chicago,

where no extra charge is made, is not a legally sufficient reason, as contended by these carriers, for an extra charge at the Union Stock Yards." (R. 28.)

The Commission held that section 15(5) of the Act applies to interstate transportation by rail of ordinary livestock to all public stockyards, including the Union Stock Yards of Chicago, and that under it no extra charge may be made for any portion of the necessary service of delivery into suitable pens, "and consignees are entitled to delivery at pens suitable for proper delivery without charge for the mere placement therein of the livestock." (R. 28.)

The Commission cited and quoted from the decision of Mr. Justice Harlan in *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128, decided March 2, 1891, holding that a carrier of livestock has no right to make a special charge for merely receiving or merely delivering such stock in and through stockyards provided by itself in order that it may properly receive and load or unload and deliver and that, if the carrier may not make such special charges in respect to stockyards which it owns, maintains, or controls itself, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees; and further, that the transportation of livestock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

The Commission's ultimate findings, aside from the finding in reference to the alleged unreasonableness of the switching charge found applicable to carloads of livestock placed for delivery at complainant's plant, were as follows:

> We further find that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens.
>
> We further find that complainant paid charges found inapplicable, was damaged thereby in the amount paid, and is entitled to reparation in that amount with interest. Complainant should comply with rule V of the Rules of Practice. (R. 31.)

Commissioner Eastman concurred in the report as far as it went, with one exception, but did not believe it went far enough, (R. 31–32) stating that his general position in cases of this kind was indicated in his dissenting expression in *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705, 710, 711. He there expressed the opinion "that the transportation service of defendant carriers on inbound shipments of livestock [to the Cincinnati Union Stock Yards, which had been found to be the station of defendant carriers for the delivery and receipt of livestock at Cincinnati] does not end until the consignee has been given a reasonable time, after notice of the arrival of the shipments at destination, to accept delivery and remove them from the premises," and that "the consignee is lawfully entitled to such

service without penalty of any storage or handling charge paid to the carrier or its agent or to anyone else." He there further said "no pens are 'suitable' for delivery within the meaning of section 15(5) of the Interstate Commerce Act unless they permit of such reasonable opportunity to accept delivery and remove the livestock from the premises after notice of arrival." As to the case at bar he said: "It does not seem to me that the unloading pens in this instance permit of reasonable opportunity to accept delivery and remove the livestock from the premises after notice of arrival, and hence that they are not in all respects 'suitable' for delivery within the meaning of section 15(5) of the Interstate Commerce Act." (R. 31–32.) The exception referred to above was that he did not regard as sound the doctrine enunciated in *Memphis Freight Bureau* v. *K. C. S. Ry. Co.*, 17 I. C. C. 90.

Commissioners Lee, Meyer, Porter, Mahaffie and Miller dissented because they disagreed with the conclusion of the majority to the effect that the yardage charges assailed were inapplicable in instances where delivery is taken at the unloading pens; that section 15 (5) of the Interstate Commerce Act states the full duty of the carriers in the delivery of shipments of livestock at public stockyards; and that the Commission has no jurisdiction over the imposition of yardage charges on livestock after it has been delivered into unloading pens at public stockyards, such jurisdiction having been conferred upon the Secretary of Agriculture by the Packers & Stockyards Act, 1921.

January 20, 1934, defendants petitioned for reconsideration and reargument. This petition was denied by the order of July 2, 1934. (R. 37.)

Proceedings in Court below

Bill, subsequently amended, (R. 3) was filed by a number of the railroads against which the order was directed to enjoin and set aside the order, naming the United States and the Commission as defendants, and they filed answers. (R. 38, 42.) The Union Stock Yard Transit Company intervened as plaintiff. (R. 47.) The Hygrade Food Products Corporation intervened as defendant (R. 48) and filed an answer. (R. 50.) Hearing was held before a three-judge court consisting of Circuit Judge Martin T. Manton and District Judges John C. Knox and Henry W. Goddard.

October 30, 1934, Circuit Judge Manton delivered the opinion of the Court stating its findings of fact and conclusions of law, (R. 54–61) and this was concurred in by the other two judges. The Court fully sustained the Commission's order.

Final decree dismissing the bill for want of equity was filed November 3, 1934. (R. 61.)

The effective date of the Commission's order of July 2, 1934 was September 20, 1934. (R. 38.) At the request of the district court the Commission postponed this effective date to November 5, 1934. A thirty-day stay of the Commission's order was granted by the district court. (R. 70–71.)

Prior proceedings in this Court

An application was made to Mr. Justice Stone for a further stay of the Commission's order until the determination of the appeals in this Court, and in view of the circumstances and of the bond which appellants offered to give neither the United States nor the Commission nor the Hygrade Company opposed the stay and it was granted by order of Mr. Justice Stone November 15, 1934. (R. 79–80.)

SUMMARY OF ARGUMENT

I. The yardage charges in question were imposed as an extra charge in connection with the delivery, and for the mere delivery, of interstate shipments of livestock. The livestock were purchased by complainant in various western states and were intended for delivery at and slaughter in complainant's plant. All complainant wanted was transportation and delivery of its shipments. They were taken into the Union Stock Yards and complainant in order to get delivery was compelled to go into the Yards and to pay the yardage charges for the privilege of taking them out. The question of the legality and reasonableness of such charges, assessed in connection with the delivery of interstate shipments, is within the Commission's jurisdiction. By section 1 (1) the provisions of the Act are made to apply to the interstate transportation of property and in section 1 (3) "transportation" is defined as including, among other things, "all services in connection with the * * * delivery * * * of property transported." The

Commission's jurisdiction is coextensive with "transportation" as so defined. *Cleveland & St. L. Ry.* v. *Dettlebach*, 239 U. S. 588, *Southern Ry.* v. *Prescott*, 240 U. S. 632, *Erie R. R.* v. *Shuart*, 250 U. S. 465.

The delivery which a carrier of livestock is under the duty to make cannot be safely or effectively made except in or through enclosed yards or lots, convenient to the place of unloading. The duty to receive, transport and deliver livestock will not be fully discharged unless the carrier makes such provision at the place of unloading as well as enable it to properly deliver the stock to the consignee. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128. Such provision has been made by the Chicago carriers under an arrangement whereby the Chicago Union Stock Yards are their livestock terminal at Chicago, providing for them the means of making the deliveries which they are under obligation to make. In connection with the transportation of interstate shipments of livestock consigned to those yards as a mere place of delivery, the Yards function not as a public stockyard but as the agent of the carriers in providing the facilities for delivery. The provisions of the Interstate Commerce Act and jurisdiction of the Commission thereunder apply to all services and charges in connection with such deliveries.

The uncontroverted facts and the Commission's finding under them show that the complainant obtained no services at the Union Stock Yards other than delivery of its shipments. The only instances in which the order here in question ap-

plies are instances in which the complainant-consignee took delivery at the unloading pens. The animals were driven by complainant's employees from the unloading pens direct to its plant, stopping only for weighing the animals, which is a carrier service. No yardage service was furnished. The yardage charges were assessed on the sole ground that complainant had to drive the animals across the property of the Yards Company. This was mere egress from the Yards. No extra charge may lawfully be made against a consignee for the privilege of taking his goods from the carrier's terminal. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128.

Under the provisions of sections 1 (6), 6 (7), and 15 (1) of the Act the Commission is authorized to correct unreasonable or unlawful practices of carriers affecting rates or charges in all matters connected with the delivery of property transported.

Packers & Stock Yards Act, 1921, provides that nothing therein shall affect the power or jurisdiction of the Interstate Commerce Commission. The order in question, having relation to the delivery of livestock transported in interstate commerce, is within the jurisdiction of the Commission and therefore is not affected by Packers & Stock Yards Act or the jurisdiction of the Secretary of Agriculture thereunder. Complainant made no objection to yardage or other charges assessed by the Stock Yards Company in instances where it sought and obtained stockyards' services, as in instances where it purchased

livestock from commission men and traders doing business in the Yards.

In previous cases the Commission has given careful consideration to the question of its jurisdiction over shipments of livestock to public stockyards and has correctly held that it has jurisdiction where no stockyards' services are performed and where the stockyards are used by the carriers merely as a place of delivery of interstate shipments. *Allied Packers* v. *A., T. & S. F. Ry. Co.*, 161 I. C. C. 641; *Strauss & Adler* v. *N. Y. C. R. Co.*, 153 I. C. C. 609; *Kahn* v. *B. & O.*, 192 I. C. C. 705; see also *Gobel* v. *B. & O. R. Co.*, 200 I. C. C. 606.

Section 15 (5) of the Interstate Commerce Act is a remedial provision entitled to be liberally interpreted and not narrowly as reducing the common carrier obligations of railroads or as restricting the powers of the Commission. Under this provision it is the duty of railroads transporting ordinary livestock destined to public stockyards to make delivery at such yards into suitable pens without extra charge. This provision enlarges the Commission's jurisdiction because under it it must determine the suitability of the pen. A pen is not suitable unless the consignee can take delivery from it without extra charge, where the pen is an unloading pen and the consignee is on hand at the time of the unloading from the railroad cars and takes delivery then and there without wanting or obtaining any stockyards' service.

Section 15 (5) did not restrict the Commission's jurisdiction over transportation as defined in section 1

and did not relax the common law duty of carriers to make delivery. Each provision of the Act must be given a reasonable construction with a view to carrying out all its provisions. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442, 443, *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 567, *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 366. Nothing in the language of section 15 (5), nothing in its legislative history, nothing in the Packers & Stock Yards Act, and nothing in the legislative history of that Act indicates an intention to relieve common carriers from their time-honored duty of making delivery of livestock without extra charge through their established livestock terminal whether owned by themselves or hired from somebody else.

II. The Commission's finding here that the Union Stock Yards at Chicago are the livestock terminal of all line-haul carriers transporting livestock to Chicago is supported by precedent and by substantial evidence of record in the present proceeding. In *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, 224, the Commission found that the Chicago Stock Yards are the terminals for the receipt and delivery of the railroads utilizing them. In *Adams* v. *Mills*, 286 U. S. 397, 409, the Court said it is clear the yards are in effect terminals of the railroads, that "they are in fact used as terminals, and necessarily so." The fact that the Stock Yards have been used uninterruptedly since their creation in 1865 as the established place of delivery of livestock in Chicago, of all railroads reaching that city, shows they are

the livestock terminal of all those carriers. The trackage rights of the various carriers over the Chicago Junction Railway to the Union Stock Yards, their publication of rates to the Yards, the fact that they maintain an agent there and other facts show that Union Stock Yards is a station on their rails. The Yards are necessarily the carriers' livestock terminal because the great volume of the livestock traffic to and from Chicago could not practically, conveniently, and economically be handled by any other facilities in that city. The failure and refusal of the carriers to make delivery to complainant upon sidetracks in its plant of shipments of livestock consigned to it, and the actual delivery of all such shipments in the Union Stock Yards, corroborates other evidence showing that those Yards are their public livestock terminal in Chicago. That this is so is further shown by the unwillingness of the carriers to change the present practices under which the great volume of the livestock traffic is now delivered through one centralized depot, without confusion, congestion or delay.

III. The existence of certain pens in the outskirts of the City of Chicago, the use of which by complainant was found by the Commission to be impractical, does not affect the validity of the Commission's finding that the complainant is entitled to delivery, without extra charge, at the carrier's established livestock terminal, the Union Stock Yards.

IV. The order is adequately supported by essential quasi-jurisdictional and other findings. The asserted

lack of finding of a violation of any provision of the law overlooks the findings (a) that the extra charges in question, applied in connection with the transportation of interstate shipments, were not published in tariffs filed with the Commission; (b) that no services were performed after the unloading in instances in which the consignee took delivery at the unloading pens for which defendants may lawfully assess charges; (c) that in such instances carload shipments of livestock consigned to complainant at the Union Stock Yards are not subject to yardage charges; (d) that such charges in those circumstances are "inapplicable." The finding of a violation of section 6 alone was sufficient to support the order. The chief purpose of the Act was to secure uniformity of treatment to all and the principal provision seeking to obtain this end was to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. *Shreveport* case, 234 U. S. 342, 356, *Abilene* case, 204 U. S. 426, 437, *Mottley* case, 219 U. S. 467, *International Coal* case, 230 U. S. 184, 197, *K. C. S. Ry.* v. *Albers Comm. Co.*, 223 U. S. 576, 597, *Pittsburgh etc. Ry. Co.* v. *Fink*, 250 U. S. 577. Where there is a departure from the tariffs duly filed with the Commission discrimination is presumed as matter of law. *C. & A. R. Co.* v. *Kirby*, 225 U. S. 155, *Davis* v. *Cornwell*, 264 U. S. 560, *C. & O. Ry.* v. *Westinghouse*, 270 U. S. 260. Under these cases it is to be presumed, as a matter of law, that the departure from section 6, found by the Commission in this case, resulted in undue preference

and discrimination. Filing the yardage charges with the Secretary of Agriculture could not cure this violation of section 6 nor satisfy the purpose of that provision. That tariff could have no lawful application to transportation or any part thereof. Nor was the tariff given the publicity required by the Interstate Commerce Act so that shippers could ascertain in the manner contemplated by the Interstate Commerce Act the full amount of the charges applicable to their shipments. *United States* v. *C. & A.*, 140 F. 646, 156 F. 558, 212 U. S. 563.

But the Commission did not rest its decision solely on the section 6 violation but proceeded to determine whether there were any services performed for which a reasonable charge might be made and found that there were no such services, the carrier not being entitled to assess an extra charge against the consignee for the mere privilege of taking his shipments out of the carrier's terminal.

Thus the Commission here made the quasi-jurisdictional findings essential to the constitutional or statutory validity of the order. *United States* v. *B. & O. R. Co.*, decided January 7, 1935. Having found that the extra charges were imposed in violation of section 6, and further that aside from that violation, no services were rendered for which an extra charge could lawfully be made, it then was authorized and required to exercise its jurisdiction under section 15 (1) and make an order directing the removal of the practice. Since the Commission found the practice to be *ipso facto* unlawful, there could be no question

as to the unreasonableness of the practice. *A., T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 773. Section 15 (1) gives the Commission jurisdiction over practices which are violative of any provision of the Interstate Commerce Act. The reasonableness of the line-haul rates was not in issue. The findings under section 15 (5) were adequate. Many of appellants' contentions as to lack of findings amount to no more than a complaint because the Commission did not repeat in its report here discussions in earlier reports on the same questions of *law*. The Commission found that the Union Stock Yards function as agent of the line-haul carriers in the delivery of livestock. The order is not lacking in definiteness and certainty. It leaves the carriers free to comply with its plain terms by any appropriate action. Nor is there any uncertainty as to the circumstances in which the yardage charges may or may not be imposed. The order plainly provides that such charges may not be imposed "in instances where delivery is taken at the unloading pens provided for such purposes."

V. Appellants are under the duty, inhering in every transportation service, to provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's terminal. The order in question does not enlarge this duty. It makes no requirement as to any particular facilities for this purpose.

VI. The long existence of a practice cannot clothe it with immunity. *Warehouse Co.* v. *United States*,

283 U. S. 501, *Louisville & Nashville R. Co.* v. *Interstate Commerce Commission*, 282 U. S. 740.

VII. The order was properly directed against the Stock Yards Company as well as against the railroads, since it functions for the carriers in providing livestock terminal facilities and in collecting all freight and other charges. In such circumstances the Commission is expressly authorized by section 2 of the Elkins Act to direct such an order against the Stock Yards Company, and there was no occasion to redetermine its status as a common carrier. Moreover, the Stock Yards Company, insofar as it acts as agent for the carriers, would be bound by the order under section 16 (7) of the Act and hence the inclusion of the Stock Yards Company, if erroneous, was harmless. It could act as agent of the line-haul carriers regardless of its status as a common carrier. *Adams* v. *Mills*, 286 U. S. 397.

ARGUMENT

I

The order in question, directing the correction of a practice which results in the assessment of extra charges found to be inapplicable, yet imposed and collected upon Interstate shipments, is within the jurisdiction and authority of the Commission under the provisions of the Interstate Commerce Act.

(a) The Commission's jurisdiction is co-extensive with "transportation", as defined in section 1 (3) of the Act, including all services in connection with the delivery of property transported.

As pointed out by Mr. Justice Harlan in the *Covington Stock Yards* case, 139 U. S. 128, "when livestock reach the place to which they are consigned,

it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading." In other words, "the duty to receive, transport and deliver livestock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee."

The carriers transporting livestock to Chicago have made such provision under an arrangement with the Union Stock Yards & Transit Co. As found by the Commission, the Chicago Union Stock Yards are the livestock terminal at Chicago of all the individual line-haul carriers transporting livestock to Chicago, and they provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make. (R. 26.) As shown later (section II, *infra*) this finding of fact is supported by precedent and substantial evidence in this proceeding.

The Commission also found that the Union Stock Yards are public stockyards. (R. 26, 28.) But their function as public stockyards is different both factually and legally from their function as the livestock terminal or depot of the railroads. In connection with the transportation of interstate shipments of livestock consigned to those yards as a mere place of delivery, the Yards function not as a public stockyard

but as the agent of the carriers in providing the facilities through which the carriers make the deliveries which they are legally obligated to make.

The provisions of the Interstate Commerce Act and the jurisdiction of the Commission thereunder apply to all services and charges in connection with such deliveries. Under section 1 (1) the provisions of the Act are made to apply to the interstate transportation of property, and under paragraph 3 of that section the term "transportation" is given a special definition enlarging its ordinary meaning and causing it to embrace much more than the actual *movement* from origin to destination. It includes, among other things "all services in connection with the * * * delivery * * * of property transported."

The term "transportation" as defined in the Act has been construed by this Court in *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, *Southern Ry.* v. *Prescott*, 240 U. S. 632, and others, and these cases are here relevant because they make it clear that the Commission's jurisdiction is co-extensive with the *transportation* of interstate commerce as that term is enlarged by the statutory definition, attaching with the beginning of transportation as defined in the Act and ending only when the defined transportation terminates, because they hold that delivery is part of such transportation, and because they indicate when such delivery legally takes place.

In *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588, Mr. Justice Pitney referred to the letter and

policy of the Commerce Act, and especially the provision of the Hepburn amendment of 1906 which enlarged the definition of the term transportation. "From this and other provisions of the Hepburn Act," he said, "it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like."

That case related to a shipment of household goods from Denver, Colo., on September 18, 1911, to Cleveland, Ohio, where they arrived September 27 but were not called for by the consignee, and remained in the possession of the carrier as warehouseman for over a month, when part of them were lost. It was held that the "transportation" had not ended, in view of the definition of that term in the Commerce Act.

In *Southern Ry.* v. *Prescott*, 240 U. S. 632 (1916), the Court, speaking through Mr. Justice Hughes, again had occasion to refer to the Act's definition of transportation:

> By the Act to Regulate Commerce (section 1) the "transportation" it regulates is defined

as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." It is made the duty of the carrier "to provide . . . such transportation upon reasonable request therefor." All charges made for "any service" rendered in such transportation must be "just and reasonable." Section 6 requires that the carrier's schedules, printed as provided, "shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." And it is further provided, in the same section, that no carrier shall "extend to any shipper or person any privileges or facilities in the transportation"—that is, as defined—"except such as are specified in such tariffs." The bill of lading in accordance with the published regulations provided that "every service" to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the Company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service

> forming a part of the "transportation" in the sense of the Federal Act and governed by that Act. (*Ibid.*, 637.)

The Court then quoted with approval the above-quoted language from the *Dettlebach* case and added that "the terminal services incident to an interstate shipment are within the Federal Act, * * *." It was held that the shipment there involved was still in the course of "transportation" though the goods had arrived at destination, notice of the arrival had been given the consignee, the entire freight charges had been paid, the consignee had given a receipt for the goods, and part of them had been taken away from the freight station.

See also *Erie R. R. Co.* v. *Shuart*, 250 U. S. 465; *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43; *Atchison Ry. Co* v. *United States*, 232 U. S. 199, 212; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 441; *Danciger* v. *Cooley*, 248 U. S. 319, 327.

Under the above decisions it is clear that property shipped remains under transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station; in other words, delivery is not complete until the goods are removed from the carrier's possession and premises.

(b) The uncontroverted facts and the Commission's finding upon them show that the complainant obtained no services at the Union Stock Yards other than delivery of its shipments.

It is clear and undisputed that the consignee obtained no stockyards services in instances in which he

took delivery at the unloading pens—and these are the only instances in which the order here in question applies. In all such instances the consignee has driven the animals directly to its plant, stopping in the yards only long enough to have the animals weighed, and this service is admittedly performed by the Stockyards Company as agent for the railroads, for the weights so obtained are used as a basis for the computation of the freight charges which are collected by the Stockyards Company also as agent for the railroads. (R. 106, 107, 150, 155.) The only service claimed to be performed by the Yards Company in such instances is the use of its property in driving the animals out of the yards. The general manager of the Yards Company testified that its activities with respect to livestock fall into two distinct categories, first, "loading and unloading livestock for the railroads which haul such stock to and from the stock yards" (R. 148); second, "furnishing a stock yards service to shippers and consignees of live stock". (R. 151.) After describing this second service, and stating that "It includes in fact all of the services performed by the Yards Company except those heretofore described as constituting the unloading service and the service of loading livestock," (R. 152) he stated that "a service additional to the unloading service is performed by the Yards Company, even on livestock of which possession is taken by consignees immediately upon unloading and while the stock is in the chute pens," namely: "Such animals must be driven across property of the Yards

Company, there being no other way of getting the animals from the chute pens to a location outside the yards." (R. 152.)

The testimony of complainant's traffic manager was to the same effect. He testified that the yardage charge "is a charge imposed by the Union Stock Yard & Transit Company to cover the delivery of the stock to us after it has been unloaded from the cars." (R. 107.) As to what service is performed for the yardage charge he testified that—

> in some instances the hogs are driven by employees of the Stock Yard Company from the unloading chutes to the holding pens, where they have access to water. At that point they are held under lock and key until delivery is made to our employees, who drive them from those pens. In other instances, our own employees accept delivery at the unloading chutes, drive the animals direct to the scales and from the scales to our plant. The latter procedure is followed in about 15 percent of the direct shipments. Eighty-five percent of the direct shipments are put in holding pens where we accept delivery later, and in 15 percent of the cases the Hygrade Company take delivery at the unloading chute. The [yardage] charge is the same in both cases. When animals are placed in holding pens by stockyards employees, I do not think there is any other service rendered than that I mentioned. If such animals are fed or bedded we pay an additional charge for that. It is not covered by the yardage charge. After the delivery of the stock to us either at the chutes or in the

> holding pens, our men drive the stock to the scales where they are weighed by the weighmaster of the Stock Yards Company. Our men then drive the animals from the scales to our plant. No other service is performed by Stock Yards employees after weighing. (R. 107–108.)

The stock yards witness did not claim there was a "yardage service" performed in such instances but his testimony indicates to the contrary by his affirmative statement that such yardage service was performed in the other instances in which the consignee did not take possession while the animals were in the chute pens. His statement reads:

> On all animals of which the consignee does not take possession while they are in the chute pens, a yardage service is also performed. As explained, these animals must be removed almost immediately to other pens and are there held for sale, and during this time they receive the stockyard services which I have mentioned. (R. 152–3.)

It may be noted here that the stock yard's general manager conceded that it was permissible and practicable for the consignee to take delivery at the unloading or chute pens provided it is done at the time of the unloading of the animals.

His testimony was:

> Consignees may take delivery of animals at the chute pens if they so desire, but if this is done it must be done almost simultaneously with the unloading of animals into the chute

> pens. This immediate removal of animals from the chute pens is absolutely necessary in order to preserve an even flow of livestock from the cars into the yards. If the consignees are not prepared to take delivery of animals consigned to them immediately upon their placement in the chute pens, they are removed from the chute pens to other pens by employees of the Yards Company. (R. 150.)

In the light of the above testimony the Commission made its finding that "It is here demonstrated that there are no services performed after unloading for which the defendants may assess charges, in instances where delivery is taken at the unloading pens." (R. 31.)

This testimony and the Commission's holding upon it, considered with the finding that the Chicago Union Stock Yards are the livestock terminal at Chicago of all the individual line-haul carriers transporting livestock to Chicago, and that they provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make, show that the extra charge in question was imposed in connection with the *delivery* of interstate shipments of livestock and was a charge for the mere delivery in the sense that that expression is used in the decision of Mr. Justice Harlan in the *Covington Case*.

(c) Under the provisions of sections 1 (6), 6 (7), and 15 (1) of the Act, the Commission is authorized to correct unreasonable or unlawful practices of carriers affecting rates or charges and all matters connected with the delivery of property transported.

The order in question requires the defendants named therein to cease and desist from the practices described in the report "which subject complainant to the payment of yardage charges on livestock, in carloads, consigned to complainant at Union Stock Yards, Chicago, in instances where delivery is taken at the unloading pens provided for such purposes."

In the report the finding is made that the extra charges assessed in connection with the delivery of the shipments in question, denominated yardage charges, are not published in any schedule on file with the Commission. (R. 27.) The further finding is made "that there are no services performed after unloading for which defendants may assess charges, in instances where delivery is taken at the unloading pens," (R. 31) and this is followed by the findings "that livestock, in carloads, consigned to complainant at the Union Stock Yards was not and is not subject to yardage charges in instances where delivery was or is taken at the unloading pens," and that in such instances the yardage charges are "inapplicable." (R. 31.)

The effect of the order, read with these findings, is that the yardage charges, assessed as extra charges in addition to the regular published and filed rates

for the transportation, are not applicable in instances in which delivery is taken by the complainant at the unloading pens, and that therefore the defendants should cease and desist from their practices which subject complainant to the payment of such charges.

Such an order is within the authority of the Commission under the provisions of Section 1 (6), 6 (7), and 15 (1) of the Interstate Commerce Act. Section 1 (6) makes it the duty of common carriers to establish and observe reasonable regulations and practices affecting rates, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property, and declares every unjust and unreasonable classification, regulation, and practice to be unlawful.

Section 6 requires all rates and charges assessed for transportation subject to the Act to be published, filed with the Commission, and posted at stations, and such schedules shall plainly state, *inter alia*, "all terminal charges," "all privileges or facilities granted or allowed" and "any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." Paragraph 7 of section 6 provides that no carrier shall "charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the

rates, fares, and charges which are specified in the tariff filed and in effect at the time * * *."[4]

Provisions for the enforcement of these substantive enactments are contained in section 15 (1) which provides that whenever, after full hearing, the Commission shall be of opinion that any practice whatsoever of any common carrier subject to the Act is or will be unjust or unreasonable, *"or otherwise in violation of any of the provisions of this Act,"* the Commission is authorized and empowered to determine and prescribe what practice is or will be just and reasonable to be thereafter followed, and to make an order that the carrier shall cease and desist from such violation.

In *Adams* v. *Mills*, 286 U. S. 397, the Commission's holding that the extra charge there involved was an unlawful practice was challenged by the railroads and the Stock Yards Company. After referring to the Commission's findings, the Court, sustaining the order, said:

> If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained. *Atchi-*

[4] Penalties for violation of this provision are provided in section 10 (1), and the Elkins Act makes it a criminal offense for a carrier to deviate from its established tariffs. *Armour Packing Co.* v. *U. S.*, 209 U. S. 71; *U. S.* v. *Union Stock Yards*, 226 U. S. 287; *American Express Co.* v. *United States*, 212 U. S. 522, 530; *N. Y., N. H. & H. R. R. Co.* v. *I. C. C.*, 200 U. S. 361; *C. & A.* v. *Kirby*, 225 U. S. 155, 164.

son, T. & S. F. Ry. Co. v. *United States*, 232 U. S. 199, 221; *Los Angeles Switching Case*, 234 U. S. 294, 310, 311.

(d) Nothing in Packers and Stockyards Act, 1921, affects the jurisdiction of the Commission under the Interstate Commerce Act.

In enacting the Packers and Stockyards Act the Congress was careful to preserve the full jurisdiction of the Commission. Section 406 (a) of that Act (42 Stat. 159, U. S. Code, Tit. 7, sec. 226) provides:

> Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary [of Agriculture] concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

Since the subject-matter of the order in question is within the jurisdiction of the Commission, having relation to the delivery of livestock transported in interstate commerce, it is not affected by the Packers and Stockyards Act or the jurisdiction of the Secretary of Agriculture thereunder.

It is important to note that complainant made no objection to the yardage charges or other charges assessed by the Stock Yards Company in instances where it sought and obtained stockyards' services. (R. 120.) The record shows that complainant purchases substantial quantities of livestock from commission men and traders doing business in the yards. (R. 26, 102.) It made no complaint against the yardage or other charges assessed by the Yards Company on such livestock, pointing out that in such

instances the pens of the company are used for holding the livestock and as a place of business for its purchase and sale. (R. 120, 138.) In such instances the stock is also fed and watered by the Yards Company. For these services it imposes separate charges in addition to the yardage charges, as published in its tariff (Ex. 23) on file with the Secretary of Agriculture under Packers & Stock Yards Act, 1921. Its complaint to the Commission brought in issue the legality of the yardage charges only when assessed on interstate shipments consigned to the complainant for delivery at its plant in Chicago. In the record such shipments are frequently referred to as "directly consigned" shipments to distinguish them from shipments consigned to commission men at the yards. (Cf., *Adams* v. *Mills*, 286 U. S. 397.) [5]

[5] Complainant's traffic manager while testifying stated: "We complain of the assessment of the yardage charges of the Stock Yards Company on livestock consigned direct to our plant and received through the Stock Yards Company but do not complain of the charge on cattle which we buy in the stockyards. We do not pay any yardage charges directly on cattle [livestock] we buy at the Stock Yards but we certainly pay it when we pay for the cattle. We do not complain of that charge because the cattle are afforded further service such as sales service. The Yards Company furnishes sales pens for the commission men to sell the cattle in and they are moved from one point to another. The animals are driven when necessary, are furnished pen service when necessary, and are furnished water." (R. 120.) Later the witness stated: "*All we are asking is free delivery on livestock billed to us direct.*" (R. 120.) Complainant's counsel stated, "I would like to make this statement for the record, and that is that the basis of our complaint is that the service which the Stock Yards Company renders for us is a

(e) In previous cases the Commission has given careful consideration to the question of its jurisdiction over shipments of livestock to public stockyards and has correctly held that its jurisdiction extends to the point of actual delivery to the consignee.

In *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641, the entire Commission gave careful consideration, upon appeal from a decision of a division of the Commission, to the question of its jurisdiction over shipments of livestock to public stockyards. The stockyards there involved were owned and operated by the New York Central Railroad Company at Buffalo, N. Y. The shipments involved had been transported by the railroad from origins in other states, and were delivered through these stockyards. The charges assailed, labeled storage charges, filed with the Secretary of Agriculture under Packers and Stockyards Act, which were similar in principle to the "yardage" charges here involved, covered the service of furnishing the chutes, pens, driveways and runways necessary to remove the stock from the cars at the unloading point in the yards and take it from that point out of the stockyards. These charges were assessed, as in the case at bar, even when the

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service of delivery which is part of the transportation service, *and that is all we want and all we require.* Now, the Stock Yards undertakes to do more than that in the case of some of its patrons, and sometimes it does more than that for us. As to these other patrons and ourselves, when we buy on the Yard we have no complaint to make of the Stock Yards charge. The purpose of this testimony was to show what this other service was as to which we make no complaint, for the purpose of distinguishing our situation in which we require one delivery." (R. 138.)

complainant's employees were waiting and ready to receive the stock at the time of its arrival and unloading from the cars, and when, as here, the unloading and driving of the stock through the stockyards was, as far as practicable, one continuous movement and transaction. The division of the Commission had held, 144 I. C. C. 377, among other things, that section 15 (5) of the Interstate Commerce Act required defendants to unload complainant's shipments into suitable pens, but that the transportation ended when the stock was unloaded into the chutes or storage pens and that thereafter it was subject to the provisions of the Packers and Stockyards Act, 1921. After reargument of the case on appeal before the Commission the decision of the division was reversed.

The Commission referred to the provisions of section 1, pars. (1) and (3), of the Interstate Commerce Act and said that under section 1 (1) the Act applies to common carriers engaged in the transportation of passengers or property by railroad; that section 1 (3) defines the term "railroad" as including all terminals and terminal facilities of every kind used or necessary in the transportation of persons or property designated, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property; that the term "transportation" is defined as including all instrumentalities and facilities of shipment or carriage and all services in

connection with the receipt, delivery, storage, and handling of property transported. (161 I. C. C. 643.)

The Commission further said that the undertaking of the carrier to transport goods necessarily includes the duty of delivering them to the consignee entitled to their possession, citing *North Penn. Railroad* v. *Commerical B'k.*, 123 U. S. 727. "A carrier does not fulfill this obligation to deliver by merely providing a place where goods may be taken out of a car, but it must also provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. *Covington Stock Yards* v. *Keith*, 139 U. S. 128; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70. This service inheres in every transportation." (Page 644.)

"With the foregoing statements of the carrier's duties in mind," the Commission said, "the conclusion seems inevitable that the stockyards when used to perform the service described were terminal facilities used in the transportation of property, and were freight depots, yards, or grounds used in the delivery of such property, and that the service described is clearly a service in connection with the receipt, delivery, storage, and handling of property transported."

In respect of the jurisdiction of the Secretary of Agriculture under Packers & Stock Yards Act, 1921, the Commission said that the primary purpose of that act is to regulate the operations of packers, commission merchants and stockyard owners in connection with the handling of livestock consigned for sale at

primary markets, citing *Stafford* v. *Wallace*, 258 U. S. 495, 514; and pointed out that that act expressly states that its provisions shall not affect the power or jurisdiction of this Commission, nor confer upon the Secretary of Agriculture concurrent power or jurisdiction over any matter within the power or jurisdiction of this Commission.

The Commission found and concluded that the charges assailed in so far as they were assessed for the use of the stockyards facilities in effecting delivery of interstate shipments were charges for transportation within the meaning of that term as defined in section 1 of the Interstate Commerce Act, and that the Commission has jurisdiction to pass upon the legality and reasonableness of such charges.

In *Strauss and Adler* v. *New York C. R. Co.*, 153 I. C. C. 609, the Commission, in considering the question of its jurisdiction over certain service charges collected on shipments of livestock stopped en route for food, water, and rest, at page 618 stated:

> Bearing in mind that the two acts [Interstate Commerce Act and Packers & Stock Yards Act, 1921] should be construed in a manner not to create a conflict or overlapping of jurisdictions of the two Federal agencies entrusted with their enforcement, and recognizing that any doubt which may exist is by the above provision [of the Packers & Stock Yards Act that it shall not affect the power or jurisdiction of the Interstate Commerce Commission] should be resolved in favor of the authority delegated in the older of the two statutes, we

> can see nothing in the provisions of the Packers & Stock Yards Act, 1921, which in any way limits or affects the jurisdiction of this Commission previously conferred to regulate "all charges * * * for any service rendered or to be rendered in the transportation of passengers or property."

While Division 1 of the Commission had held in an earlier case, *Southwestern Horse & Mule Asso.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730, that the jurisdiction of the Commission ended when shipments of ordinary livestock are unloaded into suitable pens at public stockyards at the point of destination, and this ruling had been followed in the decision of Division 2 in the *Allied Packers* case, *supra*, the subsequent reversal by the Commission of the decision of Division 2 in the *Allied Packers* case also operated to overrule the holding of Division 1 in the *Southwestern Horse & Mule case* upon the question of jurisdication, insofar as it conflicted with the later decision of the Commission.

In a case decided even later than its decision in the *Allied Packers* case, the Commission again considered the question of its jurisdiction over yardage charges collected on ordinary livestock at public stockyards, *E. Kahn's Sons Co.* v. *Baltimore & O. R. Co.*, 192 I. C. C. 705, and it held that the yardage charges there assailed were not subject to its jurisdiction. This decision is not in conflict with its decision in the *Allied Packers* case nor the decision in the case at bar, but on the contrary correctly applies the principle upon which the decision in the *Allied Packers* case rests. That principle is this: The jurisdiction

of this Commission obtains as long as the interstate shipment is under transportation as defined in section 1 of the Interstate Commerce Act. Such transportation includes not merely unloading from the car but also a convenient and adequate way of the consignee to come and get his goods and take them safely from the carrier's property, *Covington Stock Yards* v. *Keith*, 139 U. S. 128; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70. But where the consignee does not take such delivery and avails himself of stockyard services, then the unloading and delivery of the livestock to the stockyards company, acting as agent for the consignee, marks the end of the Commission's jurisdiction and the beginning of the jurisdiction of the Secretary of Agriculture. In the *Kahn* case the Commission, after pointing out that the stockyard company considered in that case is not owned by the carriers, said—

> And no additional charge is made when delivery is taken from the unloading pens. (192 I. C. C. 708.)

The Commission further held, and this is one of the principles underlying its decision in the case at bar:

> The shipping public is entitled to reasonably convenient and safe chutes, pens, and ways for discharging live stock from the cars, and taking them from the carriers' premises without a yardage charge. Not until the live stock can be so removed does the line-haul transportation cease. (Page 709.)

The recent decision of Division 3 of the Commission, in *Adolf Gobel, Inc.* v. *Baltimore & O. R. Co.*, 200 I. C. C. 606, is very similar to the Commission's decision in the *Kahn* case, and holds that the yardage charges there assailed, which were clearly for stockyards' services rather than transportation services, were not subject to the Commission's jurisdiction. The report in the *Gobel* case states—

> If complainant desired delivery at the unloading pens it could be had, but no request was made to hold livestock in the unloading pens nor did it endeavor to take delivery there.

The report in that case further shows that in each instance the stock was driven by stockyard employees to the holding pens and there held for various periods ranging up to a maximum of two days. Clearly this was stockyards service not subject to the Commission's jurisdiction.

(f) Legislative history of Packers & Stockyards Act discloses intention not to restrict jurisdiction of Commission.

In support of their argument that the yardage charges in question are subject to the jurisdiction of the Secretary of Agriculture and not the Commission's, the appellants in No. 606 quote in part (brief pp. 24–25) the statement of the Chairman of the House Committee on Agriculture [Congressman Haugen] at the time the bill which later became Packers & Stockyards Act, 1921, was under consideration. This statement was made orally upon the floor of the House, in explanation of the bill, and is here quoted in full:

It is proposed to give the Secretary of Agriculture jurisdiction over the packers, stockyards, commission men, traders, buyers, and sellers, and all activities connected with the slaughtering and marketing of live stock and live-stock products in interstate commerce; that is, the Secretary shall have jurisdiction from the time the live stock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission.

Up to the time of unloading the live stock the Interstate Commerce Commission has jurisdiction over the shipment, distribution, and ownership of stock, refrigerator cars, and other equipment, and transportation rates, including belt lines and terminal roads. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends; or, in other words, the Interstate Commerce Commission is to continue its exclusive jurisdiction over transportation rates and compelling the carriers to furnish refrigerator and stock cars, and so forth, and the Secretary is to have exclusive jurisdiction over all transactions connected with the slaughtering and marketing of live stock and live-stock products in interstate commerce, subject, of course, to court review; * * *. (Congressional Record, 67th Congress, 1st Session, Vol. 61, Part 2, Page 1800.)

The Congressman's statement as to the jurisdiction of the Commission seems correct as far as it goes, but was not necessarily intended to be a full,

detailed, complete, or exhaustive statement of the Commission's jurisdiction. It is no doubt true that ordinarily the jurisdiction of the Commission over shipments of livestock to public stockyards ends with the unloading, because in the great majority of instances such livestock is consigned to commission men doing business at the yards, utilizing stockyards' facilities and services, and upon the unloading of their stock in the yards, transportation ends. In several cases the Commission has denied its jurisdiction beyond the unloading in cases where the consignees have obtained stockyards services as distinguished from mere delivery service. *Kahn* v. *B. & O.*, 192 I. C. C. 705; *Gobel* v. *B. & O.* 200 I. C. C. 606. Apparently the Chairman of the Committee on Agriculture, in making his oral statement to the House, did not have in mind instances in which, through arrangement with the railroads, the stockyards function as the livestock terminal of the railroads, and did not have in mind at the moment the large number of authorities, including the decision of this court in the *Covington Stock Yards* case, that in such circumstances the consignee is entitled to delivery without the assessment of a special charge. Under the circumstances it seems that the Congressman's statement is not to be taken as conclusive, and as not binding upon this Court if it finds that under the provisions of the Interstate Commerce Act the Commission does have jurisdiction under the facts disclosed in the instant case.

It may be added that in the written committee report (House Report No. 77, 67th Congress, 1st Session, submitted by Mr. Haugen from the Committee on Agriculture) the only reference to the question of jurisdiction as between the Secretary of Agriculture and the Interstate Commerce Commission appears on the last page of the report (page 16), which states that section 406 of the bill, H. R. 6320, as favorably reported by the Committee,

> makes it clear that the Interstate Commerce Act [Commission] is not to be deprived of its existing jurisdiction over terminal railways in the stock yards *or over any other matter now subject to its control.* (Italics supplied.)

(g) Section 15 (5) of the Interstate Commerce Act, a remedial provision, is to be liberally interpreted and not narrowly as reducing the common carrier obligations of railroads or as restricting the powers of the Commission.

Section 15 (5) contains provisions in respect to the *charges* for the transportation by railroad of carload shipments of livestock destined to or received at public stockyards. The language of the provisions indicates that it has reference primarily to charges, by providing what shall be included in the transportation without extra charge. It provides that transportion wholly by railroad of ordinary livestock, in carload lots, destined or to received at public stockyards shall include three services "without extra charge therefor to the shipper, consignee or owner," namely, (a) all necessary service of unloading and reloading en route, (b) delivery at public stockyards

of inbound shipments into suitable pens, (c) receipt and loading at such yards of outbound shipments.

There is nothing in the language that seems to narrow or restrict the Commission's jurisdiction, but on the contrary it apparently enlarges that jurisdiction to the extent that under it, in connection with section 12 requiring the Commission to execute and enforce the provisions of the Act, and section 15 (1) authorizing the Commission to remove by order any violation of the Act, the Commission has the added jurisdiction to determine in any case whether an extra charge has been imposed in violation of its provisions, and in the case of inbound shipments to public stockyards, the suitability of the pen, and otherwise enforce the provision.

The provision is remedial and would seem to be entitled to a liberal interpretation that fairly accomplishes its purpose. *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 391; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 72. Under it it is the duty of railroads transporting ordinary livestock destined to public stockyards to make delivery at such yards "into *suitable* pens." Under a liberal interpretation of the word "suitability" it would seem that a pen from which it is impossible for a consignee, who has gone to whatever expense and trouble may be necessary to be right there on hand at the time of the unloading of his stock, to take his shipments without extra charge, cannot be a "suitable" pen. It might have four out of five elements of suitability. It might be safe, that is, there might

be present no elements of danger, such as barbed wire. It might be bedded with straw, and it might be protected from the elements; but it would still lack one absolute essential of suitability if the person who was a party to the transportation contract and who had taken the trouble to be right there when the train came in at whatever time of day or night, could not take his stock away from the pen without the payment of extra charges. Such a pen would lack that much of being a suitable pen, and there is nothing in this provision of the Act to indicate that the Congress meant to take away from transportation the time-honored element of opportunity to accept delivery. The Commission has here held that it is not unreasonable and not a violation of any provision of the Interstate Commerce Act to assess a charge where the stock had to be put into a holding pen until the consignee came to take. But in the case of the 15 percent of the consignee's shipments as to which they have gone to the trouble to be there for the purpose of taking, and did take, transportation did not cease until that opportunity to take was extended. So long as that essential part of transportation continued, the Commission had jurisdiction and cannot escape the responsibility of acting under that jurisdiction. If it be said that, in going out from the pen into which the livestock had been driven down from the railroad car, the stock passed over runways of the Stock Yards, by necessity of the method of construction of the Stock Yards, this could not alter the law. This fact would emphasize

the view that any such pen would not be suitable if there were an extra charge made for the passage of the livestock from the pen. Furthermore, if it be said that the stockyard facilities were a convenience to the shippers and receivers of livestock, it may be said with equal force that the stockyards were a convenience to the carriers. They elected to make Union Stock Yards, Chicago, a station for the receipt and delivery of this character of freight, livestock, and published rates thereto, and if the location of consignee's plant be said to be favorable, it may be presumed the favorability of that location was reflected in the purchase price he paid for the plant. If it is a favorable location the railroads are not concerned. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46.

This same provision forbids the imposing of an extra charge for the receipt and loading at such stockyards of outbound shipments. How could livestock get into these pens without going over the roads or runways of the stockyards, any more than they could be taken out. If an outbound shipment were tendered at this station of the carriers, would they not have to receive and load without extra charge from these very pens?

The Commission's report says the complainant did not allege that the yardage charges in issue were unreasonable if they may be lawfully applied and relied upon section 15 (5) of the Act. The complaint specifically alleged that the yardage charges are not carried in any tariff on file with the Commission and are

consequently being collected without tariff authority (R. 20), and are therefore in violation of section 6 of the Interstate Commerce Act. It further alleged that the Yards Company operates public stockyards which are also operated as a depot of the railroads for the receipt and delivery of livestock at the station, Union Stock Yards; that such delivery is accomplished through the sidings, chutes and pens of the Yards Company, and that in accomplishing said deliveries that company is the agent of the railroads; that in respect of numerous carload shipments of livestock heretofore made complainant has directed that delivery be made to it at its own sidings and chutes, but defendant carriers have refused to make such delivery and have insisted that complainant take delivery through the chutes and pens of the Yards Company; that for these yardage charges neither the defendant carriers nor the Yards Company rendered any service over and above the necessary service in making delivery to complainant of its shipments of livestock as required by section 15 (5) of the Interstate Commerce Act; that the yardage charges purport to cover services rendered after transportation has been completed but that in fact, as applied to complainant's shipments, transportation is not completed until said livestock is delivered to complainant and placed in its control, and consequently said charges cover a portion of the interstate transportation services rendered. In view of these allegations it seems obvious the statement in the Commission's report above referred to means that the complainant did not

allege that the yardage charges are unreasonable in instances in which yardage or other stockyards' services are actually rendered—for then and then only might the yardage charges be lawfully applied. It is obvious, too, that complainant did not rely solely on section 15, paragraph 5, although under the above-suggested interpretation that paragraph alone would be sufficient, but aside from the statutory provisions relied upon by the complainant, the Commission could afford relief under any other provision of the Act which the established facts showed to be violated, *Chicago, Rock Island & Pacific Ry.* v. *United States*, 274 U. S. 29, 37.

Appellants contend that section 15 (5) had the effect of limiting the Commission's jurisdiction, that under it the Commission no longer has jurisdiction over the entire transportation service, including delivery (*Dettlebach* case, *supra*, *Prescott* case, *supra*) but that the Commission's jurisdiction ends upon the unloading in the yards. They also contend that the provision reduces their common law duty to make delivery (*Covington* case, *supra*) and that under it their common carrier obligations end upon the unloading.

In the *Allied Packers* case, *supra*, the Commission also carefully considered this jurisdictional question, and, overruling the earlier decision of Division 2 in the same case and the decision of Division 1 in the *Southwestern Horse & Mule* case, *supra*, held that section 15 (5) did not restrict its jurisdiction over

"transportation" as defined in section 1. It said, page 646:

> The terms of the paragraph do not indicate an intention to redefine transportation or to modify or restrict the definition of transportation contained in section 1, or to restrict our jurisdiction.

It held that the charges assailed insofar as they were assessed for the use of the stockyards' facilities in effecting delivery of interstate shipments were charges for transportation within the meaning of that term as defined in section 1 of the Interstate Commerce Act, and that it has jurisdiction to pass upon the *legality* and *reasonableness* of such charges. (Page 647.) It was there contended, as here, that section 15 (5) is a specific enactment defining transportation insofar as movements of ordinary livestock to public stockyards is concerned, and, being a later enactment than the general provision in section 1 (3), takes precedence over it. Rejecting this contention the Commission said:

> The specific enactment takes precedence over the general enactment only where there is conflict between the two; in the absence of conflict both must be given effect. A specific provision that with respect to certain shipments certain services shall be included within the term transportation is not in conflict with a general provision which merely includes in the same term a great variety of services with respect to all classes of shipments. If a particular service is included in the general

> definition, the failure to include the same service in a specific provision covering certain shipments does not indicate an intention to exclude such services. The paragraph in question contains no words indicating an intention to repeal or modify section 1 (3), and repeals by implication will not be indulged if there is any other reasonable construction. *25 Ruling Case Law*, page 918. (*Ibid.*, 646.)

This construction seems to be correct, in view of decisions of this Court indicating that each provision of the Interstate Commerce Act must be given a reasonable construction with a view to carrying out all the provisions of the Act. In *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442, 443, Chief Justice White pointed out that every provision of the Act must be "read in connection with the context of the Act" and that if "the general terms of the section when taken alone might sanction" a construction destructive of certain rights conferred in other parts of the Act, the context must be considered and the general terms be so construed as to give full effect to the entire Act. "The Act cannot be held to destroy itself." In *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 567, Mr. Justice Brandeis said that the last paragraph of section 4 when read alone might compel a certain construction but that it may not be read alone. It must be construed in the light of the purpose of its enactment, of the earlier paragraphs of section 4, and other sections in the Act to Regulate Commerce designed to prevent unjust discrimination. In *Penn-*

sylvania Co. v. *United States*, 236 U. S. 351, 366, Mr. Justice Day said that "while section 3 remains part of the Act in its original form, it must be given a reasonable construction with a view to carrying out all the provisions of the Act and to make every part of it effective, in accordance with the intention of Congress."

In support of their contention respecting this jurisdictional question appellants rely largely on what they assert to be the history of section 15 (5). But the history of that section indicates there was no intention to restrict the Commission's jurisdiction or to modify the common law duty of carriers to make delivery of livestock without extra charge for the mere delivery. In view of the importance of the question a full history of that provision is here given.

History of section 15 (5)

Section 15 (5) was added to the Interstate Commerce Act by section 418 of Transportation Act, 1920 (41 Stat. 484, 486). Many of the important provisions of that Act were recommended by the Commission (see its 1918 and 1919 annual reports to Congress) but the provision enacted as section 15 (5) was not among its recommendations. The original bill introduced by Congressman Esch on June 2, 1919 (H. R. 4378, 66th Cong. 1st Sess.), contained no provision bearing upon the subject matter of section 15 (5) as ultimately passed. Hearings on this bill were held before the House Committee on Interstate and Foreign Commerce during July,

August, September, and October, 1919, and it was during the course of those hearings that the subject matter was first suggested. The suggestion came from Judge S. H. Cowan, Attorney for the American National Live Stock Association and the National Live Stock Shippers' League. Judge Cowan wrote to Congressman Esch asking for permission to present the views of the associations of livestock shippers. This letter, dated July 15, 1919, appears on pages 139–140 of "Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 66th Cong., 1st Sess. on H. R. 4378." With that letter was transmitted an "outline of principal propositions pertaining to legislation, which were adopted by the Executive Committee of the National Live Stock Shippers' League, Chicago, June 3, 1919." Proposal No. 6 thereof was as follows:

> 6. Propose and urge that there be one through rate on live stock for the whole services from point of origin to the destination at public stockyards used at [as] market place which shall include unloading into suitable pens and delivery therein at such stockyards, where the animals may be counted and checked, including such facilities as are necessary or in use for making such delivery.

On August 18, 1919, Judge Cowan appeared before the House Committee and testified at length in regard to the pending legislation. (Hearings, etc., *supra*, pages 845–892.) His statement in reference to proposal No. 6, above referred to, was as follows:

Taking the case of live stock and confining myself to that, there is a habit or custom of railroads to divide up the charges. The shipper is only concerned in getting his live stock from the point where he loads it to the ultimate market; that is, unloading it into the stockyards and getting it into the hands of the commission man who sells it. It is hard for him to know what ought to be the charges if they are to be segregated into a charge for this and a charge for that and the other. I think there ought to be a requirement that as to all public markets for live stock there shall be a through rate from point of origin to destination, including a delivery into the pens to the consignee or his agent; that the railroad company should have sufficient compensation for that, of course, goes without saying. About one-half cent per hundred pounds will cover the aggregate of all these special charges that are put on. In particular instances, they oftentimes become quite burdensome. You gentlemen who are familiar with it will recall that the Supreme Court of the United States a long time ago in the case of the *Covington Stockyards Co.*, held, before the enactment of the act to regulate commerce, that it was the obligation of the carrier to receive live stock and carry it to its destination and there deliver it to the consignee, and they refused to allow the special charge which was made. After the act to regulate commerce, the Federal court at Chicago—and it seems that the people are awful shifty out there—discovered that in the sixth section of the act, because it provided

there should be published all special charges, if any, that therefore they could impose a $2 charge at Chicago for reaching the stockyards which the railroad companies had built. Mind you, the railroads in Chicago went in together and built the stockyards for their own depot and convenience. They continued to own and operate them for their own convenience and for their own benefit for years. It looked like a pretty good thing as the market was building up, so they sold the stockyards, but continued the railroad managers as the board of directors. After a while, the stockyards people who had bought them thought they wanted some money, and so they added a trackage charge of 40 cents a car in and 40 cents out, to some roads and 75 cents to others; and thereupon the railroads added $2 to all live stock delivered at Chicago. Now, as a charge against the shipper, they are progressing with that.

Mr. HAMILTON. Added $2 for what?

Mr. COWAN. Added $2 to the through rate, and the Santa Fe Railroad to-day maintains that the end of its line for live-stock shipments into Chicago is at Corwith, where there is one pen, no water, grown up in weeds, and very difficult to find, the planks rotted and never used.

Mr. COOPER. Judge, does not that $2 apply to other institutions in the country outside of stockyards?

Mr. COWAN. Oh, yes. I am just speaking in behalf of live stock. I say that this idea of adding these little charges here and there

> is very pernicious and hits the shipper in the face where he can not help himself, and we ought to have to all public stockyards a flat through rate to pay for the service, because the shipper is getting just one thing. He gets his stock shipped from his farm to the place where it is sold. Whatever compensation the railroad ought to have let it have it, but let it have it for doing the one thing which to the shipper is a single proposition. He never sees any of it except it is deducted out of his account of sales.
>
> I will prepare and submit to the committee a proviso to meet that requirement, which I think ought to be enacted, * * *. (*Ibid.*, 874–875.)

Later in his testimony Judge Cowan again adverted to this subject and stated:

> Also with respect to the matter to which I have heretofore referred of one rate from point of origin to public stockyards that are denominated as terminals of the railroads, the depots, terminals, and public markets, there ought to be one rate just the same as if that stock pen actually belonged to the railroad. A railroad would not make two rates to its own pens if it owned and operated them, and neither should it do so with respect to pens which it uses in the same manner. There should be one fare, the same as a passenger rate, to such depot as they use in a given city. I will submit a brief in connection with an amendment, which I will propose which will cover that point, and I will not take your time on that. (*Ibid.*, 881.)

While the Senate bill dealing with the same subject matter (S. 3288) was under consideration, Senator Cummins, the author of the bill, on December 16, 1919, proposed the insertion of the following paragraphs as an amendment to section 15 of the Act to regulate commerce (59 Cong. Rec. 674):

> Through rates for transportation wholly by railroad shall be made for the entire ordinary transportation service from point of origin to the destination and delivery at the depots, warehouses, team tracks, or other usual unloading places; and in case of ordinary live stock destined to be received at public stockyards, to include the service of unloading and delivery of inbound shipment into suitable pens, and receipt and loading of outbound shipments; such to be deemed the carriers' facilities. This provision shall likewise apply to other than ordinary live stock destined to or received from such stockyards handled in the same manner, provided that where by reason of the extraordinary value of the animals or their condition, it is reasonably necessary for their proper care and handling, such additional service as is reasonably necessary in properly caring for the same, the unloading and delivery or loading thereof may be required by the carrier of the shipper, which, if not furnished by him, shall be furnished by the carrier and reasonable charge made therefor against the shipper—all of which shall be carried in tariffs and subject to the determination of the Commission.
>
> Public stockyards are those used as facilities for handling live stock at places of sale, pur-

chase and slaughtering, including those at which the Department of Agriculture maintains inspection of meat animals for slaughter, and such other places as the Commission may find in common use for handling or buying and selling live stock by carloads, to be designated by the Commission.[6]

Thereupon Senator Cummins stated the reasons for the amendment, as follows (59 Cong. Rec. 674):

Mr. CUMMINS. Mr. President, this proposed amendment has been brought to my attention by the American National Live Stock Association, of which Judge Cowan, of Fort Worth, is the general counsel.

The reasons that have been submitted to me for the adoption of the amendment are that it has become the practice of the railroad companies, or those connected with the railroad companies, to separate their charges, and when a shipper, especially a live-stock shipper, asks what the rate is from the point of origin to the point of delivery, which is a stockyard, the rate is given according to the published tariff, and then the railroad company adds to the rate a series of charges for various services performed in connection with the transportation of the livestock, so that the shipper

[6] There were a number of prints and reprints of several bills. H. R. 10453, as amended in the Senate, struck out all after the enacting clause and substituted an entirely new bill. The above-quoted amendment, proposed by Senator Cummins, appeared in the reprint of December 20, 1919, of H. R. 10453, as the fifth and sixth paragraphs of a proposed amendment to section 15 of the Act to Regulate Commerce pages 179–180.

does not know from time to time what it will cost him to have his stock delivered at the point to which he ships it.

I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rate that must be paid by the shipper for the entire service of taking the property at the point of origin and delivering it to the point at which it is to leave the car. I think it is an amendment which will tend toward the protection of those who have occasion to use the railroads in the shipment especially of live stock.

The amendment was agreed to. (*Ibid.*)

February 21, 1920, the conference report on the bill was read in the House. In conjunction with their report the House managers made the following statement (59 Cong. Rec. 3264):

Transportation of Live Stock—

(Section 418 of the conference bill.)

Section 44 of the Senate amendment provided that through rates on live stock should include *unloading and other incidental charges* in the case of shipments consigned to public stockyards. The House bill contained no reference to this matter. The conference bill *amplifies* the provision of the Senate amendment and provides that "transportation wholly by railroad of ordinary live stock in carload lots destined to or received at public stockyards shall include all necessary service of un-

> loading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge to the shipper," with certain exceptions concerning which the commission may prescribe rules. (Italics supplied.)

As so amplified the provision was agreed to by both Houses and enacted as paragraph numbered 5 of section 15.

It thus appears the provision was not intended to be directed solely to loading and unloading charges but was much broader in its scope and embraced all extra charges of whatever nature in addition to the published tariff rate.

Nor was there any thought of restricting the Commission's jurisdiction, but the purpose was to remedy by specific statutory enactment a practice regarded as an evil. It was the intention, clearly expressed by the author of the provision, "to bring the whole subject within the jurisdiction of the Interstate Commerce Commission." Nor was there any thought or purpose of limiting the common carrier obligations of the railroads so that they would end upon the unloading of the stock into suitable pens. The decision of this Court in the *Covington Stock Yards* case, holding that it was the obligation of the carrier to receive livestock and carry it to its destination and there deliver it to the consignee without an extra charge, was called to the attention of the lawmakers, and the purpose of the enactment was to enforce the principle of that decision

rather than reduce the common-carrier obligations as there expounded.

It is true of course that in the great majority of instances the transportation of livestock to public stockyards does end upon the unloading of the animals into suitable pens, because the great bulk of livestock shipments to public stockyards are intended for commission men and traders doing business in the yards. In such instances a stockyards' service is furnished and when that is so the common-carrier transportation, and consequently the jurisdiction of this Commission, ends upon the unloading and thereupon the jurisdiction of the Secretary of Agriculture under the Packers & Stock Yards Act begins. The decision of the Supreme Court of Missouri in *Burton* v. *Wabash Ry. Co.*, 58 S. W. (2d) 443, so holds, the livestock shipments there involved, transported from a point in Missouri to the public stockyards at East St. Louis, Ill., having been consigned to a commission merchant doing business at the stockyards. But it is shown by the decision of this Court in the *Covington* case, by the decisions of the Commission in the *Allied Packers* case, in the *Kahn* case, in the *Gobel* case, and in the case at bar, that public stockyards frequently function in another capacity, and that is as a place of receipt and delivery, a livestock depot, for the railroads; and under the above decisions where the consignee seeks no stockyards' services but takes delivery at the time of unloading of the animals from the car and drives them directly out of the yards, no extra charge may be made for that privilege. There is nothing in the

language of section 15 (5), nothing in its legislative history, nothing in the Packers & Stock Yards Act, and nothing in the legislative history of that Act to indicate an intention to relieve common carriers from their time-honored duty of making delivery of livestock without extra charge through their established livestock terminal, whether owned by themselves or hired from somebody else.

II

The Commission's finding that the Union Stock Yards at Chicago are the livestock terminal of all line-haul carriers transporting livestock to Chicago is supported by precedent and by substantial evidence of record in the present proceeding

In previous cases the Commission has had occasion to deal with the status of the Chicago Union Stock Yards and with their relation to the Chicago Junction Railway and the line-haul carriers engaged in the transportation of livestock to Chicago. In *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209, 224, it found:

> The Chicago Stock Yards are the terminals for the receipt and delivery of livestock of the railroads utilizing them.

This finding was based upon the following subordinate findings of fact, among others:

> * * * A very large proportion, said to be as high as 98 per cent of the stock shipped to Chicago, is consigned to persons at the stockyards. None of the line-haul carriers reaches the Chicago stockyards with its own rails, but all utilize the tracks of the Chicago

> Junction Railway, for which they pay a trackage charge as published in the tariff of the latter company.
>
> * * * * * * * * These stockyards, however, are in fact a terminal for the receipt and delivery of livestock; that is one of the purposes for which they were created and one of the uses to which they are now put. The situation appears to be exactly the same as it would be were the stockyards outside the city limits of Chicago. The stockyards must be the terminal for the receipt and delivery of livestock of the railroad utilizing them. (*Ibid.* 219–220.)

In a subsequent report in the same proceeding, 58 I. C. C. 164, the Commission held:

> Standing alone the stockyards could not be readily availed of by shippers. Were it not for the tracks of the Junction Company [Chicago Junction Railway Company] delivery of cattle in carloads would not be possible. It requires the line-haul carriers, the Junction Company, and the stockyard company to make the stock yards an effective agency of interstate commerce. Under this state of facts we are of opinion and find that the stock yards are in effect terminals of the line-haul carriers, the Junction Company, and the stockyard company. (*Ibid.*, 167–168.)

This finding was sustained in *Adams* v. *Mills*, 286 U. S. 397, 409 in which the Court said:

> The defendants challenge the Commission's holding that the extra charge of 25 cents made to the shippers was an unlawful practice.

> The conclusion rests upon the findings that the Stock Yards are, in effect, terminals of the line-haul carriers; and that the service of unloading the livestock there is a part of transportation. *That the yards are, in effect, terminals of the railroads is clear. They are in fact used as terminals; and necessarily so.*. (Italics supplied.)

The finding in the case at bar, which is the same as the former finding so made and sustained by this Court, that the Union Stock Yards are the livestock terminal of the livestock carriers reaching Chicago, is fully supported by the evidence submitted to the Commission in this case.

(a) The fact that the Stock Yards have been used uninterruptedly since their creation in 1865 as the established place of delivery of livestock in Chicago, of all railroads reaching that city, shows they are the livestock terminal of all those carriers

O. T. Henkle, Vice President of the Stock Yards Company, testified (R. 147) that a history of that Company is given in the decision in *United States* v. *Union Stock Yards*, 226 U. S. 286, and in the report of the Commission in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 209. This report points out that "Prior to 1865 there were four different points in the City of Chicago at which livestock was delivered and marketed"; that "in that year the railroads then entering Chicago organized a company to be known as the Union Stock Yards & Transit Company," the stock in which was "very largely taken by the Chicago railroads." The Company "was created by a special act of the

legislature of the State of Illinois, approved February 13, 1865," with authority (a) "to construct the necessary buildings, railway tracks and loading and unloading platforms for the accommodation of the business of a general Union Stock Yard for cattle and other livestock"; (b) "to construct, maintain and operate a railway from the grounds that might be selected for its yards so as to connect with the tracks of all the railroads which terminated at Chicago." (*Ibid.*, 210–211.)

This initial history shows plainly that the Stock Yards Company was organized by the railroads for the purpose of creating one centralized place of delivery and marketing of livestock in the City of Chicago, to take the place of the several livestock terminals and markets theretofore existing—the creation of what may fairly be characterized as a "union depot" for livestock.

The charter itself is of record in the proceeding at bar, a certified copy of it having been introduced before the Commission as Exhibit No. 20.[6] Pertinent provisions of it are quoted in the *Union Stock Yards case*, 226 U. S. 296–297, and these provisions show clearly that the company was organized not only to locate, construct and maintain near what were then the southerly limits of the City of Chicago all the necessary yards, enclosures, buildings, structures,

[6] Exhibit #20 is a photographic copy of the original in script. Exhibit #21 is an exact typewritten copy (R. 146-147), and is before the Court, pages 10–26, of separate bound volume of Original Exhibits.

etc., for the accommodation of the business of a general union stock yard for cattle and livestock, but also to construct a railway from the yards "so as to connect, outside of the City of Chicago, the same with the tracks of all the railroads which terminate in Chicago * * * and to make connections with such suitable sidetracks, switches, and connections as to enable all of the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks of such company or companies which now is or hereafter may be constructed, for the purposes aforesaid, as may be agreed upon between the parties; * * * and to transport and allow to be transported thereon between said railroads and cattle yards, all cattle and livestock and persons accompanying the same to and from said yards, and may also transport and allow to be transported between the railroads entering said city, * * * freight and property of every kind as well as stock and cattle. * * *"

The court found that after its creation the Stock Yards Company acquired real estate, constructed and operated stock yards, with a stock market, and "constructed in the stock yards district about 300 miles of railroad track consisting of main lines connecting with the trunk lines entering Chicago and a large number of switches to the various industries which had been

established adjacent to such tracks." (226 U. S. 297–298.)

Having been thus created in 1865 as a livestock market, and as the livestock terminal of all railroads entering Chicago, the stockyards have been used as such continuously and uninterruptedly since that date. The record shows that all of the large Chicago packers as well as many small ones are located upon the rails of the Chicago Junction Railway, with but a single exception. (R. 166, 172, 182.) The exception is that of the Omaha Packing Company, located about 2½ miles north of the Stock Yards, on the rails of the Burlington. (R. 182.) With this exception practically all of the Chicago packers are located in what is called "Packing Town", which is the territory embracing the Chicago Stock Yards and its immediate environs. All are located upon and are served exclusively by the Chicago Junction. With this factual background the Commission's finding in the case at bar that

> No sidetrack delivery of livestock to any packing house or other industry is made by the Chicago Junction

acquires additional significance. All have private sidetracks running into and serving their plants, but livestock is not delivered on any of those sidetracks. (R. 162, 166–167, 172.) It is delivered upon and through the unloading platforms, chutes and pens of the Stock Yards Company, which has functioned since its creation as the established livestock terminal of all Chicago railroads. (R. 149, 153–154, 156, 166.)

There is the one exception in the case of the Burlington which serves the plant of the Omaha Packing Company. That industry receives no shipments and buys no livestock through or at the Union Stock Yards. All livestock received by it by rail are placed upon its private sidetracks by the Burlington. (T. 182.) The Commission found that—

> No carrier other than the Burlington delivers or places carload shipments of livestock at any private industry.

In other words, with this single exception all the trunk-line carriers reaching Chicago make deliveries of livestock at and through the Union Stock Yards. While the record shows that some of the western lines have pens at outlying places within the Chicago Switching District, the record fails to show that a single car of livestock has at any time been delivered to Chicago consignees at those outlying yards.

(b) The trackage rights of the various carriers over the Chicago Junction Railway to Union Stock Yards, their publication of rates to the Yards, the fact that they maintain an agent there and other facts show that Union Stock Yards is a station on their lines

It was testified by complainant's principal witness, and not denied by the carriers, that the Union Stock Yards "is a sub-station of Chicago." (R. 110.) Since it is an undisputed fact, as found by the Commission, that each of the individual line-haul carriers transporting livestock to Chicago have trackage rights over the Chicago Junction, it follows that the rails of that company are actually, as well as legally, part of the railroad of each of the line-haul carriers. For

section 1 (3) of the Interstate Commerce Act provides that—

> The term "railroad" as used in this Act shall include * * * all the road *in use* by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, * * *.

Cf. *Transit Commission* v. *U. S.*, 289 U. S. 121; *C. & A. R. Co.* v. *T., P. & W. Ry. Co.*, 146 I. C. C. 171.

The station Union Stock Yards is a station of each of the line-haul railroads; and they maintain an agent there—see Ex. 14, "Original Exhibits", page 9, a reproduction of a letter written by that agent, showing on the letter-head the various railroads, 23 in number, of which he is general agent at "Union Stock Yards, Chicago," and see his testimony (R. 160) that he is "general agent of the railroads at the Union Stock Yards."

The fact that the Union Stock Yards is a station of each of these trunk-line carriers is further demonstrated by the fact that each of them pays the Yards Company for loading and unloading shipments of livestock at Union Stock Yards.

It is clear, too, that all these line-haul carriers publish rates to this station (R. 106, 110–113, 178); and it is significant that these rates are in all instances higher than the rates generally applicable to other delivery stations within the Chicago Switching District. With but few exceptions the "Chicago" rate is applicable to all deliveries within the district but

on livestock to the Union Stock Yards the rate is the "Chicago" rate *plus* $2.70 per car and $1.35 per car on shipments from the West and East, respectively. (R. 110–111, 179.)

Conceding that the line-haul carriers publish rates on livestock to the "industries, chutes or sidings" of the Union Stock Yards, counsel argue that these tariffs limit their duty to transporting the livestock to those places and that they are under no duty to make delivery there without an extra charge to the consignee for the privilege of taking his livestock out of the yards. But these tariffs are no different from any others which specify, as required by section 6 of the Act, the "places between which property * * * will be carried." When the property reaches the place of destination, in this case the industries, chutes or sidings of the Union Stock Yards, the carriers are under the duty to make delivery and under the authorities hereinbefore cited they may not lawfully assess an extra charge against the consignee for the use of their facilities in removing his property from the terminal.

(c) The Chicago Union Stock Yards are necessarily the carriers' livestock terminal because the great volume of the livestock traffic to and from Chicago could not practically, conveniently, and economically be handled by any other facilities in that city

The volume of the traffic is shown by the testimony that in the year 1930, 23 railroads brought into the stockyards 204,828 cars containing more than 14,000,000 animals. (R. 149.) The outbound traffic was 48,501 cars. (R. 149.) Practically all of these

cars were brought in in trainloads, many of the trains containing as many as 70 cars. (R. 149.) It was testified in behalf of the Stock Yards Company that to perform all the services at the stockyards it is necessary to maintain an organization and facilities which are very complete. (R. 153.) "The organization must be prepared to function at all hours and must always be maintained at a point which will enable it to take care of the maximum amount of business. Handling stock in this fashion, both as to loading and unloading service and the yards service, is the only thing that renders practical the receipt, sale and delivery in the Chicago market of the animals that are handled there daily. The Chicago market is now and for many years has been the largest and most important livestock market in the world. *It has reached this development only because livestock deliveries are concentrated* * * *." (Witness Henkle, Vice President Stock Yards Company, R. 153.)

Witness Henkle further testified that "as a result of the methods of handling livestock which have obtained in Chicago for the last 50 years, an essential speed in handling the traffic has been developed. This speed is necessary if congestion and delays are to be avoided. It permits the handling of livestock in trainload lots, which could not possibly be done if deliveries were scattered. It permits the making of necessary records without delay or damage to the stock itself and has proven eminently satisfactory to everybody and must be conceded to be the only

practical method of taking care of the volume of livestock traffic which moves to and from Chicago every day. The system of handling has been developed over a long period of years. The entire structure would be torn down by any requirement that livestock deliveries in the congested areas of the Chicago Yards should be made in any other fashion. (R. 156.)

(d) The failure and refusal of the carriers to make delivery to complainant upon the sidetracks in complainant's plant of shipments of livestock consigned to complainant, and the actual delivery of all such shipments at the Union Stock Yards, corroborates other evidence showing that those yards are their public livestock terminal in Chicago

Delivery of all inbound shipments of carload freight *other than livestock* is made upon complainant's tracks by the Chicago Junction, and the rate applicable is the "flat" Chicago rate, the switching charge of the Chicago Junction being absorbed by the line-haul carrier. (R. 103–104; Exs. 6, 7 and 8.) But all inbound shipments of livestock consigned to complainant were taken by the line-haul carriers into the unloading platforms in the Union Stock Yards and in order to get its livestock out of the Yards it was compelled to pay the yardage charges even though it took delivery at the unloading pens *and all it wanted was delivery of its stock*. (R. 138.)

Shortly after complainant acquired its Chicago plant in 1929, it sought to secure delivery of its shipments of livestock upon the sidetracks in its plant. Most of its livestock moves over the Chicago & North Western, and it endeavored to arrange with

that carrier for such sidetrack delivery but was unsuccessful. (R. 115.) In September, 1930, it instructed the shippers to consign the livestock to it at Chicago, for delivery by the Chicago Junction Railway, and to place a notation upon the bill of lading indicating that the shipment was not to go into the Union Stock Yards at Chicago. (R. 113–114.) Exhibit No. 12 ("Original Exhibits", p. 7) is a typical bill of lading of this character. It is dated Sioux Falls, S. Dak., September 29, 1930, and covers three carloads of hogs consigned to complainant at Chicago for Chicago Junction Railway delivery, with notation thereon "Do not go into U. S. Yds. Chgo." None of these cars was placed on complainant's siding but all were taken directly to the Union Stock Yards and unloaded and placed in the pens there. That was done without complainant's authorization or consent. Complainant was notified it could get the stock or leave it. (R. 114.) The stock was unloaded by the Yards Company at its platform where it had been taken by the line-haul carrier. After the livestock had been unloaded without complainant's consent, it removed them from the stockyards and brought them to its plant. Complainant eventually paid the yardage charges on this livestock. In paying the bills as rendered in the first place [7] it eliminated the yardage charge but the Stock Yard Company notified com-

[7] These bills included the freight charges, as well as the yardage and other charges. See R. 106, 150; and Ex. 11, a typical bill (Original Exhibits, p. 6).

plainant that it would hold current shipments of complainant's stock in the yards until the earlier bills for yardage charges were paid. (R. 114.) So, under compulsion, complainant paid the charges. It thereafter made no further attempt to secure delivery at its plant, aside from having its livestock contracts name it as the consignee (R. 114), these efforts being abandoned because they appeared to be futile (R. 115). Complainant was never given delivery on its private sidetracks of any of its shipments of livestock, either before or after the above instances. (R. 115.)

Various reasons and excuses were given by the carriers for failure to make this sidetrack delivery (see R. 115–116; 122–126; 130; 161; 176–177), but the testimony in this regard read as a whole demonstrates that the carriers were unwilling to establish the precedent of sidetrack delivery to any packer in the stockyards district. They were unwilling to do so because if one packer obtained such delivery, other packers would want it, and confusion, congestion and delay would result, as fully explained by witnesses for the defendants. (See testimony of William J. O'Brien, General Manager, Chicago Junction Ry., R. 162–174; J. A. Behrle, Assistant Freight Traffic Manager, Alton Railroad, R. 180–181; O. T. Henkle, Vice President and General Manager, Union Stock Yards & Transit Co., R. 149–150, 153–154, 156. See also testimony of witness Benjamin B. Greer, R. 140–144.)

While the Commission's report finds that "there are *now* no facilities there for the unloading of livestock and no scales for weighing," it is important to note that *at the time* the demands were made by complainant for delivery at its plant, it had on hand facilities which permitted such delivery, and the carriers' refusal to make delivery there was not because of absence of such facilities. (See R. 99–102; 119–120.)

(e) That the Union Stock Yards are the railroad livestock terminals in Chicago is further shown by the unwillingness of the carriers to change the present practices under which the great volume of the livestock traffic is now delivered through one centralized depot, without confusion, congestion, or delay

The general manager of the Chicago Junction explained that to deliver at complainant's plant shipments of livestock consigned to it would be awkward, fruitful of delay and more expensive than the ordinary handling of the business. (R. 162.) Today the trains are hauled by the engines of the trunk lines direct to the unloading platforms of the Stock Yards Company, the crews and engines remain with the trains, and after unloading the cars are moved out to their own terminals, which "provides a very expeditious method of handling the heavy run of livestock." (R. 162.) This method has been followed ever since the stockyards were constructed in 1865. (R. 162.) If the method of making individual sidetrack delivery to consignees were employed "it would mean special arrangements which I will have to visualize, *it never actually having occurred.*" It would mean the sepa-

ration, the switching out of these particular cars of stock; in the home terminals of the trunk lines bringing in the stock to Chicago. This could not be permitted to occur on the tracks or in the yards or terminals of the Chicago Junction, because of the congestion and delay that would result. (R. 162–163.) It would not be possible for the trunk-line trains to stop at some junction yard in Chicago before they got to the stockyards, and set out the cars for the Hygrade Company, because of the congestion and delay that would result. "Ordinarily," it was testified "these trains move direct to the unloading platforms, and almost every day or every night you will find one train following another, where there are anywhere from 1,000 to 2,000 cars of stock moving; and to stop these trains to do any switching would be very detrimental; it would tie up the main thoroughfare used by these trains, and diverting them into any special yards for that purpose would be impossible because we have no yard that could be devoted to that purpose." (R. 163.) When such a train stops on the Chicago Junction's main track it necessarily delays everything behind it; and it is very congested in the Stock Yards district—"on the nights when the stock runs are heavy, we have a very heavy movement of traffic over our rails." (R. 163.) There is no district within the Chicago area that is as congested as the Stock Yards district and no place in Chicago where there are so many foreign line crews moving over the tracks of any other company. (R. 163.) When business is normal there are often as high as 200 for-

eign engines on the Chicago Junction's rails in the course of a 24-hour period. (R. 163.)

In many cases under the requirements of the confinement law [8] the animals must be unloaded within a certain specified time, requiring that delivery be expedited. This is the reason, the witness explained, why it is hurried to the Union Stock Yards. (R. 165.)

The witness testified that there are about 25 other packing plants located immediately around the Stock Yards in practically the same position as the Hygrade plant, and while some of them are small, others are the largest in the world. (R. 166.) It would be very difficult to make direct delivery to these various plants. (R. 166.)

There was considerable additional testimony on this subject (see R. 166–171; also 142–143, 180–181), but what has been referred to above is sufficient to show that the Union Stock Yards are in effect and in fact the livestock terminal of the Chicago railroads. They are necessarily so because of impracticability if not the impossibility of properly delivering the great volume of the traffic through any other facilities now existing in Chicago.

[8] Popularly known as the 28-hour law, approved June 29, 1906, c. 3954, 34 Stat. 607, U. S. Code, Tit. 45, c. 4, secs. 71–74, which prohibits the confinement of livestock in interstate transportation in a railway car or other vehicle for a longer period than 28 consecutive hours, with certain exceptions, without unloading into properly equipped pens for rest, water, and food. One of the exceptions is that upon the written request of the owner, the time of confinement may be extended to 36 hours. Cf. *Strauss & Adler* v. *New York C. R. Co.*, 153 I. C. C. 609 and 188 I. C. C. 487.

III

The existence of certain pens in the outskirts of the City of Chicago, the use of which by complainant is impractical, does not affect the validity of the Commission's finding that the complainant is entitled to delivery, without extra charge, at the carriers' established livestock terminal, the Union Stock Yards

Appellants contend, in substance, that all of them have escaped their duty to make delivery at their established livestock terminal in Chicago, the Union Stock Yards, because some of them have provided pens at outlying points where delivery could be taken without the assessment of yardage or other charges in addition to the line-haul rate to Chicago. There is some evidence in the record about certain outlying stock pens, but it is very fragmentary. The only oral testimony in the record on the subject is the testimony on cross examination of complainant's traffic manager, which is reproduced verbatim in the record. (R. 121–122.)

In addition to the above oral testimony there was reference to the tariffs of certain railroads which concurred in Agent Galligan's tariff I. C. C. No. 182 (R. 112–113), this testimony having been put in to show that Union Stock Yards is a railroad station in the Chicago district, i. e., a substation of Chicago. Some of these tariffs referred to certain outlying stock pens, but there is no evidence whatsoever in the record to show the adequacy, accessibility or suitability of these pens, and there is no finding in the

Commission's report in these respects.[9] The question in issue here is not "a pure question of law to be determined by merely reading the tariffs." Compare *Adams* v. *Mills*, 286 U. S. 397, 409. Reference to the tariff provisions referred to will show, however, that their principal purpose is to make certain that an extra charge in addition to the Chicago line-haul rate applies when those railroads transport livestock shipments to Union Stock Yards in Chicago, viz., the aforementioned terminal charge of $2.70 or $1.35 in addition to the line-haul rate. To the extent that any of them indicate that the Union Stock Yards is not a station on their lines in Chicago they are in direct conflict with the evidence and the Commission's findings in this case which show that the Union Stock Yards are a station on their lines to which they transport livestock in great volume with their own locomotives and crews over the rails of the Chicago Junction Railway under trackage rights.

Upon the strength of the above evidence the Commission made the statement in its report that "Within the switching limits of Chicago, in addition to the facilities of the Union Stock Yards, certain of the line-haul carriers maintain facilities for unloading livestock, the use of which by complainant is imprac-

[9] The fact that there is no finding in this respect in the case at bar distinguishes it from the earlier decision of Division 1 of the Commission in the *Southwestern Horse & Mule case*, 129 I. C. C. 730. There it was found that the individual pens and other stock yard facilities maintained at Fort Worth by the line-haul carriers were "accessible to and adequate for the traffic under consideration." (Page 735.) That case was different from the present one in several other respects.

tical." But the Commission concluded, found and held that the *livestock terminal* at Chicago of the individual line-haul carriers transporting livestock to Chicago is the Union Stock Yards; that these yards provide for the carriers the means of making the deliveries of livestock to consignees at these public yards *which they are under obligation to make*, and that since there are no services performed after unloading there for which the defendants may assess charges in instances where delivery is taken at the unloading pens, no extra charge may be made, and the fact that the line-haul carriers have other places of delivery at Chicago, where no extra charge is made, is not a legally sufficient reason for an extra charge at the Union Stock Yards.

This determination is not purely one of law; it is the determination of an administrative question, i. e., the lawfulness of the practice under which there was imposed an extra charge upon the shipper for the privilege of removing his livestock shipments from the yards. A showing that the carrier's duty, to make delivery of livestock at its terminals without extra charge for the mere delivery, is fulfilled at some of its stations, in this case the alleged outlying pens, does not relieve the carrier from performing the duty at Union Stock Yards, its established livestock terminal in Chicago.

IV

The order is adequately supported by essential quasi-jurisdictional and other findings

It is argued that the order is void on the alleged ground that the findings are inadequate in several respects.

(*a*) Particular stress is laid on the asserted lack of finding of a violation of any provision of the law. This overlooks the findings (a) that the extra charges in question, applied in connection with the transportation of interstate shipments, were not published in tariffs filed with the Commission; (b) that no services were performed after the unloading in instances in which the consignee took delivery at the unloading pens, for which defendants might assess charges; (c) that in such instances carload shipments of livestock consigned to complainant at the Union Stock Yards are not subject to yardage charges; (d) that such charges in those circumstances are "inapplicable."

The finding of the section 6 violation alone was sufficient to support the order. The underlying purpose and aim of the Act to Regulate Commerce was the prevention of discrimination, *Shreveport* case, 234 U. S. 342, 356, and to that end the duty was imposed of establishing and publishing schedules of rates and charges, and strictly adhering to them, *Abilene* case, 204 U. S. 426, 437, *Mottley* case, 219 U. S. 467, the tariff, so long as it was of force to be treated in this respect as though it were a statute, binding as such upon railroad and shipper alike, *International Coal* case, 230 U. S. 184, 197. "The chief purpose of the

Act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed." *Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U. S. 576, 597. "The purpose of the Act to Regulate Interstate Commerce, frequently declared in the decisions of this Court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the act to secure." *Pittsburgh etc. Ry. Co.* v. *Fink*, 250 U. S. 577.

Where there is a departure from the tariffs published and filed as required by section 6 of the Act, discrimination is presumed as a matter of law, as in *C. & A. R. Co.* v. *Kirby*, 225 U. S. 155, *Davis* v. *Cornwell*, 264 U. S. 560, and *C. & O. Ry. Co.* v. *Westinghouse, etc.*, 270 U. S. 260, in each of which there was such a departure.

In *Davis* v. *Cornwell*, the Court said:

> *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155, settled that a special contract to transport a car by a particular train, or on a particular day, is illegal when not provided

> for in the tariff. That the thing contracted for in this case was a service preliminary to the loading is not a difference of legal significance. The contract to supply cars for loading on a day named provides for a special advantage to the particular shippers, as much as a contract to expedite the cars when loaded. *It was not necessary to prove that a preference resulted in fact. The assumption by the carrier of the additional obligation was necessarily a preference.* The objection is not only lack of authority in the station agent. The paramount requirement that tariff provisions be strictly adhered to, so that shippers may receive equal treatment, presents an insuperable obstacle to recovery. (Italics supplied.)

Under these cases, therefore, it is to be presumed as a matter of law, that the departure from section 6, found by the Commission in this case, resulted in undue preference and discrimination.

The fact that the yardage charges were named in tariffs on file with the Secretary of Agriculture could not cure this violation of section 6 of the Commerce Act, nor satisfy the purpose of that section. First, that tariff could have no lawful application to *transportation* or any part thereof. It was a stockyards tariff, naming only stockyards' charges. Second, it was not filed with the Commission, where all rates and charges applicable to interstate transportation are required to be filed, as part of the scheme of giving them publicity, where they are open to inspection, and where the shipping public may come to determine from such officially filed tariffs the full amount of rates

and charges applicable to interstate transportation. Third, it was not posted at railroad stations, as is also required by section 6 as a further part of the regulatory scheme of giving publicity to the rates, and where a shipper from that station may examine the tariffs and determine from them the full and exact amount which he is required to pay for his transportation, and also what his competitor must pay. See *U. S.* v. *C. & A.*, 148 F. 646, 156 F. 558, 212 U. S. 563. Nor would the filing with the Secretary of Agriculture prevent the discrimination which the Interstate Commerce Act was intended to prevent, for the charges in question could be assessed in connection with the transportation of some shipments and not others, with impunity, because, if there were a prosecution for a violation of the Packers & Stock Yards Act on the alleged ground of a deviation from the stockyards' tariff, it could be shown that the charges were assessed in connection with the interstate transportation and the delivery thereof, to which the Packers & Stockyards Act has no application.[10]

But, as previously stated, the Commission did not rest its decision solely upon the violation of section 6, but proceeded to determine whether there was any

[10] Packers & Stockyards Act does not require the Yards Company to collect its yardage charges in instances where the Yards Company functions not as a stockyards but as a railroad livestock depot, and where it performs no yardage service but merely permits the consignee to use its ways to drive the stock out of the yards as a necessary part of the delivery of the interstate shipments. Hence the Yards Company will not violate Packers & Stockyards Act by obeying the order in question, as alleged by appellants in No. 606.

service performed for which a reasonable charge might be made and found, as stated, that there were no such services, the carrier not being entitled to assess an extra charge against the consignee for the mere privilege of taking his shipments out of the carrier's terminal.

It follows that the Commission here made the quasi-jurisdictional findings essential to the constitutional or statutory validity of the order. (*United States* v. *B. & O. R. Co:, Power Reverse Gear* case, decided January 7, 1935.) Having found that the extra charges were imposed in violation of section 6, and further, that aside from that violation, no services were rendered for which an extra charge could be made, it then was authorized and required to exercise the jurisdiction conferred upon it by section 15 (1) and make an order directing the removal of the practice.

(b) It is asserted that there was no finding by the Commission that the "practice" condemned by it was unreasonable. But the Commission found that the practice was *ipso facto* unlawful because under it charges were collected in connection with the delivery of interstate shipments that were not published, posted, and filed as required by section 6 and for which no services were performed for which extra charges in addition to the established tariff rates and charges might lawfully be assessed. It seems there could be no question as to the unreasonableness of a practice found to be unlawful. Cf. *A., T. & S. F. Ry. Co.* v. *U. S.*, 279 U. S. 768, 773, in which the Court held that "to make an additional charge for

having brought merchandise into a city if it should afterwards be shipped out, is *on its face* unreasonable." Thus the court below was well justified in regarding the practice in question as an unreasonable one. Its finding, however, was that the practice was unlawful. Its opinion states (R. 59–60):

> It was an unlawful practice for the Yards Company as well as the complainants [the railroads who were petitioners before the court] to thus assess and make charges in addition to the prescribed transportation rates.

The Court further held that "The Interstate Commerce Commission, by virtue of sections 13 (1) and 15 (1) of the Interstate Commerce Act, has been given jurisdiction over unreasonable practices of carriers engaged in interstate transportation," and that "This has application to the order entered herein, for the movement of livestock into unloading pens constitutes a part of their transportation; it is but the delivery of the consignee's shipment." (R. 57.) The provisions of section 15 (1) are even broader. They give the Commission jurisdiction over practices of the carriers which are violative of any provision of the Interstate Commerce Act.

(c) It is said that one of the issues presented to the Commission for determination was "whether any of appellants' rates or practices were unreasonable or otherwise in violation of the law." (Brief in No. 606, p. 66.) We refer to this statement only to point out that there was no issue in the Commission proceeding as to whether any of appellants' *line-*

haul rates were unreasonable or otherwise unlawful. The Commission passed upon all the issues in the case to the extent necessary, granting complainant relief in those circumstances where it found that relief was due.

(d) Respecting the alleged failure of the Commission to determine the rights and obligations of appellants under section 15 (5): The Commission, after quoting the pertinent provisions of this paragraph (R. 27), said:

> Under this provision of the act which applies to interstate transportation by rail of ordinary livestock to all public stockyards, including the Union Stock Yards, no extra charge may be made for any portion of the necessary service of delivery into suitable pens, and consignees are entitled to delivery at pens suitable for proper delivery without charge for the mere placement therein of the livestock.

It is manifest the Commission did not regard this provision as depriving it of jurisdiction over the complaint, for otherwise it would have dismissed the complaint for lack of jurisdiction, as in the *Kahn* case, 192 I. C. C. 705, and the *Gobel* case, 200 I. C. C. 606, in both of which cases it held that the yardage charges were imposed after tranportation had ended and were therefore beyond the Commission's jurisdiction.[11]

[11] Mandamus proceedings were instituted in the Supreme Court of the District of Columbia in the *Kahn* case. That Court refused the writ. Its decision was affirmed by the Court of Appeals for the District. *United States ex rel.* v. *Interstate Commerce Commission*, 73 Fed. (2d) 948. Certiorari was denied by this Court January 11, 1935, *United States ex rel the Kroger Grocery & Baking Co.* v. *Interstate Commerce Commission*, No. 622, October Term, 1934.

Moreover, the Commission had recently given thorough consideration to the question of its jurisdiction over shipments of livestock consigned for delivery at public stockyards and the application of section 15 (5) in such circumstances, in *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.*, 161 I. C. C. 641 (1930), which has been hereinbefore reviewed. Appellants' contention here amounts to no more than a complaint because the Commission did not repeat in its report in this case discussions in earlier reports on the same questions of law. This is also true in respect of the alleged lack of a finding on the question of jurisdiction as between the Commission and the Secretary of Agriculture over the yardage charges in question. The report clearly finds that these yardage charges were assessed in connection with the *transportation* of the shipments in question. This being true it would follow that the Commission has the jurisdiction which it here exercised. There was no lack of an essential finding on this subject.

(e) Regarding the question whether the Yards Company was acting in its own behalf or as agent of the railroads in collecting the yardage charges: The report finds that the Union Stock Yards are public yards served over the rails of the Chicago Junction by the individual line-haul carriers bringing livestock to Chicago, and they are the livestock terminal at Chicago of all these carriers. "They provide for the

carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make." (R. 26.) This seems indisputably to be a finding of agency on the part of the Union Stock Yards in the delivery of livestock for the railroads. The effect of the Commission's order is that the charges it condemns shall not be imposed, whether the Yards Company collected them in its own behalf or as agent for the railroads.

(f) Whether the Stock Yards Company is still a common carrier is immaterial in view of the finding that it functioned as agent of the railroads in connection with the delivery of the shipments in question. This is more fully covered in section VII, *infra*, of this brief.

(a) The order is not lacking in definiteness and certainty

The order requires the accomplishment of a result, namely, that there be a cessation of the practice which subjects complainant to the payment of yardage charges on livestock, in carloads, consigned to complainant at the carriers' public terminal at Chicago for delivery of such freight, in instances where delivery is taken at the unloading pens provided for that purpose. Conceivably there are several ways in which this result may be accomplished, but the order leaves it to the discretion of the management of the defendants as to the manner in which they will accomplish it. In this respect the order is not unlike orders in which the Commission requires the removal of discrimination without specifying the manner in which

it shall be removed. Such was the order in *Chicago, I. & L. Ry.* v. *United States*, 270 U. S. 287, which required several carriers to remove discrimination against another carrier (the South Shore) resulting from their refusal to make switching arrangements with it such as existed among themselves. The Court, after holding that the order did not require the steam railroads to extend any service to the South Shore, said "it leaves them free to remove the discrimination by any appropriate action." The order here under consideration leaves the carriers free to comply with its terms by any appropriate action.

The Commission's report refers to the definition of the term "transportation" in section 1 of the Interstate Commerce Act (R. 27), and discusses what constitutes delivery, citing and quoting from the decision of Mr. Justice Harlan in the *Covington* case on this subject, and it seems impossible to read the Commission's report and order without perceiving that the Commission did determine that at the time of the alleged yardage the delivery to which the consignee was entitled had not been made, and that therefore the livestock in question were still a part of transportation within the Act's definition. The determination as to the point and under what circumstances the interstate transportation of livestock to public stockyards terminates had previously been made in the *Covington* case, from which the Commission quoted:

> The transportation of livestock begins with their delivery to the carrier to be loaded upon

> its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

The Commission was not concerned with the Yards Company in its capacity as an operator of stockyards. It was concerned with that company only in its capacity as agent for the railroads in furnishing terminal facilities for the receipt and delivery of livestock at Chicago, in unloading interstate shipments of livestock, notifying the consignees, collecting the freight charges, and other services connected with the delivery of such interstate transportation. As a stockyards, it is one thing, and in that capacity is subject to the jurisdiction of the Secretary of Agriculture insofar as the Packers & Stock Yards Act applies. In its capacity as a provider of an instrumentality necessary in connection with interstate transportation by railroad, and as such subject to the provisions of the Interstate Commerce Act, either directly or through the railroads, it must comply with the Commission's order, if valid. Under such order it may not collect yardage charges in the circumstances stated in the order; and the fact that, in compliance with the Packers & Stock Yards Act, it has on file with the Secretary of Agriculture a tariff naming yardage charges cannot relieve it from the obligation to comply with the order, since, as shown above, the Packers & Stock Yards Act does not affect the

Commission's jurisdiction over transportation as defined in the Interstate Commerce Act and its jurisdiction to prescribe the practice necessary or proper to secure delivery of property transported upon just and reasonable terms. The holding of the Court in *Adams* v. *Mills*, 286 U. S., at 415, is applicable here:

> The question at issue is not the reasonableness of the charge, but the lawfulness of the practice, jointly pursued by the railroads and the [stock yards] company, of collecting the extra charge from the shipper. The reasonableness of the charge itself, and the complementary question whether the railroads should be required to absorb it, were in no way involved before the Commission; and that tribunal properly made no finding with respect thereto.

Nor does there seem to be any uncertainty as to the circumstances in which the yardage charges may or may not be imposed. The order plainly provides that such charges may not be imposed "in instances where delivery is taken at the unloading pens provided for such purposes."

V

Appellants are under the duty, inhering in every transportation service, to provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. The order in question does not enlarge this duty.

Appellants assert that the order requires them to accord to complainant the free use of a viaduct lead-

ing from the stockyards to the complainant's plant and thereby imposes upon them obligations beyond those imposed by law. But the order does not make such a requirement. It does presuppose that the appellants will fulfill the duty, included in the undertaking of all common carriers of goods and livestock, of delivering them to the consignee entitled to their possession, and to provide a space where the stock may be taken out of the car, and a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property. This service inheres in every transportation. *North Penn. Railroad* v. *Commercial Bank*, 123 U. S. 727; *Covington case*, 139 U. S. 128; *Norfolk Ry.* v. *Public Serv. Comm.*, 265 U. S. 70; *Allied Packers* case, 161 I. C. C. 641, 644.

VI

The long existence of a practice cannot clothe it with immunity

Appellants argue that the practice of assessing yardage charges at the Chicago Union Stock Yards has been in force for many years, that the Commission has acquiesced in it and is now precluded from condemning it. No case or ruling is cited in which the Commission has previously passed upon the question of the legality of the yardage charges at the Chicago Yards when assessed for the mere delivery of interstate shipments. Nor does it appear that it had come to the Commission's attention that these charges were being imposed upon interstate shipments in instances where no stockyards' services were

performed and where, as here, the charge was made solely for the privilege of egress from the yards. The assertion that the Commission has acquiesced in this practice seems unfounded. But even so, it could not escape the duty of determining the lawfulness of the practice when it was complained of in a proceeding instituted before it as violative of the Act. The long existence of a practice does not clothe it with immunity. *Warehouse Co.* v. *United States*, 283 U. S. 501, where Mr. Justice Stone said:

> Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, can not clothe it with immunity. See *Louisville & Nashville R. Co.* v. *Interstate Commerce Commission*, 282 U. S. 740.

VII

The order was properly directed against the Stock Yards Company as well as against the railroads, since it functions for the carriers in providing livestock terminal facilities and in collecting all freight and other charges. In such circumstances the Commission is expressly authorized by statute to direct such an order against the Stock Yards Company and there was no occasion to redetermine its status as a common carrier

It is contended that the order is beyond the Commission's power because the Yards Company, which is among the defendants named in the order, was not and is not a common carrier engaged in interstate commerce subject to the Interstate Commerce Act or to the jurisdiction of the Commission.

The Stock Yards Company was held to be a common carrier by this Court in *United States* v. *Union Stock Yard*, 226 U. S. 286, and by the Commission in *Live Stock Loading and Unloading Charges*, 52 I. C. C. 208, 213–214, and again by the Commission in a subsequent report in the same proceeding, 58 I. C. C. 164, 167, after full consideration of the history of the company, its activities, and its close association with and relationship to the trunk-line railroads transporting livestock to Chicago. It was admitted in the present case that the Yards Company "still owns the railroad" (R. 148) and, although there has been some change in the status of the affiliated or subsidiary companies (R. 147–148) it would seem that if it were necessary again to determine judicially whether the Yards Company is a common carrier, the determination should be in the affirmative, even though it does not now actually operate the railroad, in view of the broad provisions of section 1 (1) and (3) of the Interstate Commerce Act, and section 20 (1) thereof.

But it seems the question whether the Yards Company is now a common carrier is immaterial in the determination of the validity of the order here in question. The record shows, as the Commission finds, that the Yards Company is the agency employed by the carriers for the furnishing of their livestock terminal at Chicago. The rails of a public carrier—the Chicago Junction Railway—reach and enter upon the lands of the Yards Company and extend to the unloading platforms on its property. Each of the trunk-line carriers reaching Chicago has

rights of trackage over these rails, and, with their own engines and crews, bring in their trainloads of livestock. Upon arrival and placement alongside the unloading platforms, the Yards Company, acting as agent for and in the pay of, the line-haul carriers, unloads the livestock. For this service it receives $1.00 per car, which is paid to it by the line-haul carrier. This charge is published in a tariff which the Yards Company, in the manner provided by section 6 of the Interstate Commerce Act, has filed with the Commission. A copy thereof was introduced in the Commission proceeding as Exhibit No. 22 (page 27, "Original Exhibits"). It is Union Stock Yard & Transit Co. tariff I. C. C. No. 8, effective March 1, 1921, being a "Tariff naming loading and unloading charges on Live Stock at Union Stock Yards, Chicago", and providing as follows:

> The charge made by this Company for the service (as a carrier's agent) of loading and unloading Live Stock at the Union Stock Yards of Chicago, Ill., is as follows:
>
> For loading, one dollar ($1.00) per car of any capacity.
>
> For unloading, one dollar ($1.00) per car of any capacity.

Attention is called particularly to the parenthetical phrase in the tariff "(as a carrier's agent)", leaving no room for doubt that in performing this service it acts as agent for the line-haul carriers.

The Stock Yards Company also acts as agent for the line-haul carriers in many other capacities. In *Live Stock Loading and Unloading Charges*, 52 I. C. C.,

at pp. 213–214, the Commission found it so acts in performing the following eight services. The present record shows that it continues so to act in performing all these services, except that there is no direct evidence as to the first. The references to the present record are inserted in brackets:

(a) The service of guaranteeing the railroad companies against loss arising out of the delivery of livestock without the surrendering of the bill of lading.

(b) The service of guaranteeing freight charges. [R. 150, 155.]

(c) The service of loading and unloading the freight. [R. 149.]

(d) The service of notifying the consignees. [R. 116, 150, 154.]

(e) The service of correctly tabulating the car numbers and contents of the car. [R. 150.]

(f) The service of furnishing the weights to the carriers. [R. 154.]

(g) The service of maintaining records as to dead and crippled animals and of maintaining records showing deliveries to "billed consignees." [R. 150, 156, 175 and Ex. 15.]

(h) The service of furnishing the railroad companies terminal facilities for the receipt and delivery of live stock at Chicago. [See numerous references given above in Sec. II.]

In the case at bar the Commission finds that the Union Stock Yards are served by all the individual line-haul carriers transporting livestock to Chicago, this service being accomplished by means of operation, under trackage rights, over the rails of the Chicago Junction Ry.; that these line-haul carriers

bring in their trainloads of livestock to the unloading platforms in the yards with their own locomotives and crews; that these yards are the livestock terminal at Chicago of all of these carriers, and that they provide for the carriers the means of making the deliveries of livestock to consignees at these public yards which they are under obligation to make. Under these facts it seems impossible to deny that the Yards Company acts as agent for the railroads in making delivery of shipments such as those involved in this case and covered by the Commission's order.[12]

As such agent it is bound by the Commission's order, in view of section 16 (7) of the Act, which provides:

> It shall be the duty of every common carrier, its *agents* and employees, to observe and

[12] The Yards Company keeps a careful record of the shipments delivered to complainant at the unloading pens. An exhibit prepared from the records of the Yards Company and introduced by General Manager Henkle (R. 156, 157), which exhibit is included in the separate volume of "Original Exhibits" before this Court, following page 36, shows the shipments consigned direct to Hygrade Company from Oct. 1, 1930, to Oct. 1, 1931, and also shows whether the shipments were "yarded" or "delivered." Mr. Henkle explained that the term "yarded" as used in the exhibit means that the animals in the shipment, after unloading into the chute or unloading pens, were removed from those pens by employees of the Yards Company and that in instances where the term "delivered" is used it means that the employees of the Hygrade Company themselves took delivery of the animals directly from the unloading chutes. (R. 157.)

> comply with such orders so long as the same shall remain in effect."[13]

Since under this provision the Yards Company would be bound to observe and comply with the order in question, even though it were not named therein, it would seem that its inclusion in the order, if erroneous, would be harmless and should be treated as merely surplusage, not rendering the order invalid either as to the railroads or the Yards Company. There were good reasons for including the Yards Company in the order, among others because as agent for the carriers it actually collects all the freight and other charges involved in this case, including the yardage charges. (R. 106, 107, 150, 155; and Ex. 11, p. 6 "Original Exhibits.")

In *Adams* v. *Mills*, 286 U. S. 397, 415, a case very similar in many respects to the case at bar, involving loading and unloading charges in the Chicago Union Stock Yards, the Court said:

> Nor was the issue affected in any manner by the status of the Yards Company as a common carrier. It did not follow from such status that it could not act as an agent of the line-haul carriers, nor that it was entitled to collect a part of its charges from the shippers. Compare *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366; *Union Stock-yards Co.* v. *United States*, 169 Fed. 404, 406.

[13] Various other provisions of the Act apply to agents of carriers as well as to the carriers themselves, e. g., section 10 (1), 15 (11), 16 (8), 16 (12); see also Elkins Act, section 1, first and second paragraphs, and section 2.

Moreover section 2 of the Elkins Act (32 Stat. 847, as amended, 34 Stat. 584, U. S. C. Tit. 49, sec. 42) authorizes the inclusion as parties, in addition to the carrier, of all persons interested in or affected by the rate, regulation, or practice under consideration, and orders may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to the carriers. This section reads:

> That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, *whether such proceedings be instituted before the Interstate Commerce Commission* or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, *in addition to the carrier*, all persons interested in or affected by the rate, regulation, or *practice* under consideration, and inquiries, investigations, *orders*, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Cf., *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 66 Fed. (2d) 490; *Merchants etc. Traffic Ass'n* v. *United States*, 231 Fed. 292; *United States* v. *Milwaukee Refrigeration T. Co.*, 145 Fed. 1007.

CONCLUSION

It is respectfully submitted that the decree of the Court below dismissing the bill for want of equity should be affirmed.

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MARCH 1935.

APPENDIX

The Interstate Commerce Act, as amended (U. S. C. Tit. 49) provides:

SEC. 1. (1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of * * * property wholly by railroad, * * *

SEC. 1. (3) The term "common carrier" as used in this Act shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artifical, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services

in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

SEC. 1. (6) It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

SEC. 6. (1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the

several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

SEC. 6. (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates,

fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SEC. 10. (1) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of

not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own inititative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so

prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15. (5) Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards.

SEC. 16. (7) It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

SEC. 20. (1) That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. * * *

Elkins Act:

SEC. 1. That any thing done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who

shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court in the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate

commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or, foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a

civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

SEC. 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

Packers & Stockyards Act, 1921:

SEC. 406. (a) Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary [of Agriculture] concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

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